No. 12496

United States
Court of Appeals
for the Ninth Circuit.

OSCAR R. EWING, Federal Security Administrator,

Appellant,

vs.

MARY R. BAIOCCHI,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Northern District of California, Southern Division.

Civil No. 28187-H

MARY R. BAIOCCHI,

Plaintiff,

vs.

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,

Defendant.

COMPLAINT FOR REVIEW OF DECISION OF SOCIAL SECURITY ADMINISTRATION

Plaintiff complains of defendant and for cause of action alleges:

I.

This action is brought under the provisions of Sections 202 to 209, both inclusive, of the Social Security Act, as amended. (U.S.C.A., Title 42, Sections 402 to 409, inc.)

II.

Plaintiff is now and at all times herein mentioned has been a resident of the County of Santa Clara, State of California, and of the Southern Division of the Northern District of California. She is the widow of Almando Baiocchi, who died July 8, 1945, at the age of 51, and she is the mother of his children, Leola D. Baiocchi and Geraldine Baiocchi, both under 18 years of age at the time of their father's death.

III.

At all times herein mentioned, the Federal Security Agency was and now is an agency of the United States, and defendant Oscar R. Ewing was and now is the duly appointed, qualified and acting Director of the said agency and the Social Security Administration was and now is a division of the said Federal Security Agency.

IV.

California Prune and Apricot Growers Association is and was at all times herein mentioned a non-profit, co-operative marketing association organized under the laws of the State of California, engaged in the commercial business of buying from farmers and grading, fumigating, processing and packing dried prunes, peaches, apricots, apricot pits and nectarines, in approximately that order of importance or volume, and selling the graded, processed, fumigated and packed dried prunes, peaches, apricots, apricot pits and nectarines in the open market. At no time herein mentioned has the California Prune and Apricot Growers Association owned, leased or operated any ranch or farm, or cultivated the soil, or raised or produced or harvested any such dried fruits, or graded, fumigated, processed or packed any such dried fruits as an incident to farming operations.

V.

Plaintiff's deceased husband, Almando Baiocchi, was employed by and worked for the California Prune and Apricot Growers Association from the latter part of 1939 to and including November 4, 1944, as a packing house worker engaged in processing and packing, receiving, grading and shipping dried fruit purchased and owned by the said California Prune and Apricot Growers Association. He did not at any time herein mentioned work on, or in connection with any farm or ranch, or cultivate soil or raise, produce or harvest any such fruit, or do any work incident to ordinary farming operations and performed all of said work after delivery of the said dried fruit to the grower's market and to a terminal market for distribution for consumption. The large industrial plant at which he performed all of his work is located within the city limits of San Jose, California, and but a few blocks from the heart of the said city, in an area zoned as heavy industrial.

VI.

During the entire period of his said employment the plaintiff's deceased husband rendered services as a dried fruit packing house worker, which earned him wages, over and above any incidental maintenance work he performed, in excess of $45.00 per quarter during each and every quarter of the said period, all of which wages were duly reported quarterly by his employer to the Federal Govern-

ment and all Federal social security taxes were paid thereon.

VII.

Plaintiff did on July 19, 1945, eleven days after her husband's death, file with the Social Security Administration a written application on her own behalf as the widow of the deceased wage earner and on behalf of her two said daughters, both under 18 years of age at the time, asking for widow's current insurance benefits and minor children's benefits under the Social Security Act, as amended in 1939.

VIII.

On March 26, 1948, the said Social Security Administration of the Federal Security Agency, of which the defendant is the Administrator, made its decision upon said application and upon a request for reconsideration dated November 8, 1947, denying the said widow and minor children any benefits under the Social Security Act, as amended, upon the ground that there were not sufficient quarters of coverage because the services rendered by the deceased wage earner after January 1, 1940, were agricultural labor, even though the services rendered prior thereto were found to have been earned in covered employment.

IX.

Plaintiff on May 4, 1948, filed with the Social Security Administration a formal Request for Hearing before a Referee, which hearing was held

at San Jose California, on May 26, 1948, and at which hearing the plaintiff offered and introduced evidence in support of her application and objections to the decision denying awards. Thereafter, on June 8, 1948, the Referee who heard the matter rendered his decision reaffirming the denial of awards. A Request for Review of the Referee's decision was thereupon filed by the plaintiff with the Appeals Council of the said Social Security Administration at Washington, D. C., which Council on June 29, 1948, denied the said Request for Review. Notice of said denial was mailed to the plaintiff on June 29, 1948, with 60 days allowed in which to file civil action in the above-entitled Court for Court review of the matter. This action is begun within the said time limit.

X.

The services rendered by plaintiff's deceased husband for the California Prune and Apricot Growers Association after January 1, 1940, were in their nature identical to the services rendered by him prior to January 1, 1940, and were not agricultural labor under the provisions of the Social Security Act, as amended in 1939, and plaintiff is entitled to insurance benefits thereon for herself and two minor daughters for each month in which they themselves did not earn $15.00 or over in covered employment.

XI.

This suit is brought by plaintiff through her attorney for the specific purpose of establishing as a result of stare decisis the legal and equitable claims of plaintiff and all persons similarly situated against those funds available to the defendant for their payment under the provisions of the Social Security Act, as amended in 1939. Therefore, plaintiff's counsel requests this Honorable Court to order an equitable lien against the fund established or preserved as a result of this suit for the reasonable value of the services of the plaintiff's attorney as determined by this Court, or by appellate courts should an appeal be taken.

Wherefore, plaintiff prays that this Court review the proceedings, findings and decisions of the said Social Security Administration in this matter and enter its judgment herein ordering the defendant Federal Security Administrator to award plaintiff insurance benefits under the Social Security Act, as amended in 1939, based upon all the wages earned by the plaintiff's deceased husband during the entire period from January 1, 1940, to November 4, 1944, inclusive; that a fund be ordered established or preserved by this Court to pay said claims and the claims of persons similarly situated; that the Court grant to the plaintiff such other and further relief as the Court may deem appropriate and equitable; and that the Court grant to plaintiff's attorney a reasonable attorney's fee, as determined by this Court or by appellate courts should an appeal be taken, and an equitable lien therefor on and

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out of the fund established or preserved for the plaintiff and each of the employees and former employees of the California Prune and Apricot Growers Association (including their dependents), and other persons similarly situated, on whose behalf she brings this test suit, a decision in which will be stare decisis for all of the said employees, their dependents, and all other persons similarly situated.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

State of California,
County of Santa Clara—ss.

Mary R. Baiocchi, being first duly sworn, deposes and says that she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; and that same is true of her own knowledge except as to matters therein stated on information and belief and as to those matters she believes it to be true.

/s/ MARY R. BAIOCCHI,
Plaintiff.

Subscribed and sworn to before me this 14th day of July, 1948.

[Seal] /s/ FRANK S. BARRETT,

Notary Public in and for the County of Santa Clara, State of California.

My Commission Expires March 25, 1951.

[Endorsed]: Filed July 15, 1948.

[Title of District Court and Cause.]

ANSWER

Defendant Oscar R. Ewing, Federal Security Administrator, an officer of the United States, by Frank J. Hennessy, United States Attorney, answers the complaint herein as follows:

First Defense

1. Defendant denies the allegations of paragraph I of the complaint except to the extent admitted in the Fourth Defense herein, paragraph 9 of this answer.

2. Defendant admits the allegations of paragraphs II and III of the complaint except that he says that he is the Administrator of the Federal Security Agency and not its Director.

3. Answering pragraphs IV, V and VI of the complaint, defendant refers to the findings of fact of the Social Security Administration contained in the transcript of the record filed herewith as part of this answer as establishing the facts on which this action to review is based, and except as herein admitted denies each and every allegation in said paragraphs IV, V and VI. He specifically denies that the deceased Almando Baiocchi earned "wages" in covered employment after December 31, 1939, within the purview of Title II of the Social Security Act as amended and that he performed all or any of his work after delivery of the dried fruit

to the grower's market and to a terminal market for distribution for consumption.

4. Defendant admits the allegations in paragraphs VII, VIII and IX of the complaint.

5. Defendant denies the allegations in paragraph X of the complaint that the services rendered after January 1, 1940, were not agricultural labor as defined in the Social Security Act as amended and that plaintiff is entitled to insurance benefits.

6. Answering paragraph XI of the complaint, defendant incorporates by reference the Fourth and Fifth Defenses hereto as though set forth in full herein.

Second Defense

7. Plaintiff has no claim upon which relief may be granted, as shown by the provisions of the Social Security Act as amended; the Regulations of the Social Security Administration promulgated thereunder; the transcript of the record upon which the decision complained of was made; and the findings and conclusions of the Social Security Administration.

Third Defense

8. The services performed by deceased Almando Baiocchi after December 31, 1939, were for a cooperative marketing the fruit as agent for the producers, who retained an economic interest until the entire seasonal pack was sold, and not on its own account. Accordingly the said services were in agri-

cultural labor, and not in employment as defined in 42 U.S.C. 409(b), (1), and the payments received therefor were not wages giving rise to quarters of coverage. The facts as found by the Social Security Administration so show; the findings are supported by substantial evidence and are conclusive.

Fourth Defense

9. The court is without jurisdiction of any class suit, or to grant any of the relief prayed for with respect to persons other than plaintiff Mary R. Baiocchi. It may only review the decision of the Referee issued June 8, 1948, constituting the final decision of the Federal Security Administrator, and enter a "judgment affirming, modifying, or reversing the decision * * * " 42 U.S.C. 405(g), in so far as the rights and interests of the named plaintiff are affected. 42 U.S.C. 405(h) providing that "No findings of fact or decision of the Administrator shall be reviewed by any person, tribunal, or governmental agency, except as herein provided," precludes maintenance of a class suit on behalf of persons not parties to the administrative proceeding.

10. Under the express provisions of Section 202 of Title II of the Social Security Act, 42 U.S.C. 402, one of the prescribed conditions for establishing entitlement to benefits under Title II is that the individual claiming such benefits must file an application therefor.

11. 42 U.S.C. 405(b) provides:

"The Administrator is directed to make findings

of fact, and decisions as to the rights of any individual applying for a payment under this title. Whenever requested by any such individual or whenever requested by a wife, widow, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Administrator has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his finding of fact and such decision * * * ''

The court has no jurisdiction to pass upon the rights of an individual who has not filed an application for payment of benefits under Title II or who has not been a party to a hearing with respect to wage credits, or who is not the wife, widow, child, or parent of such individual.

12. 42 U.S.C. 405(g), further providing that ''Any individual, after any final decision of the Administrator made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action'' limits review to complaints filed by individuals who were parties to proceedings before the Social Security Administration and who have exhausted their administrative remedies, including the administrative hearing provided for by 42 U.S.C. Section 405(b), in accordance with the procedures provided for in Subpart G of Social Security Administration Regulations No. 3.

The only party claiming benefits at the said administrative hearing was plaintiff Mary R. Baiocchi.

Fifth Defense

13. The authorization for suit, 42 U.S.C. 405(g), consents only to suits by aggrieved individuals in their own right and 42 U.S.C. 405(i) specifies that plaintiffs who prevail in the courts obtain judgments of entitlement, whereupon the Federal Security Administrator is to certify to the Managing Trustee (42 U.S.C. 401(b)) the name and address of the person entitled to payment, the amount, and the time. No other kind of action against the United States or the Federal Security Administrator is authorized, and establishment of a fund for any purpose would be violative of 42 U.S.C. 405(h) and 405(i) and of R.S. 3477, 31 U.S.C. 203. The right to payments under Title II is not transferable or assignable, at law or in equity, 42 U.S.C. 407. Consequently, no equitable lien for services may be awarded and no fund may be established or preserved, whether as a source of attorney's fees or otherwise.

14. In accordance with the provisions of Title II, Section 205(g) of the Social Security Act as amended (Title 42 U.S.C. Section 405(g)) defendant files herewith as part of his answer a certified copy of the transcript of the record, including the evidence upon which the findings and decisions complained of are based.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements,

and for judgment in accordance with Section 205(g) of the Social Security Act as amended, 42 U.S.C. 405(g), affirming the decision complained of; and for such other relief as may be appropriate.

/s/ FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed October 7, 1948.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Mary R. Baiocchi, moves this honorable Court for a summary judgment in her favor as prayed for in her Complaint and against the defendant above named, upon the grounds that there is no genuine issue as to any material fact in this action and that plaintiff is entitled to the judgment prayed for in her Complaint as a matter of law.

Said motion will be based upon the Complaint, the Answer of the defendant, the transcript of the proceedings of the Social Security Administration on file herein, the records and files in said action, points and authorities filed herewith and upon Rule 56(a) and (c) of the Federal Rules of Procedure and Sections 205 and 209 of the Social Security Act as amended (Title 42, U.S.C.A. 405 and 409).

Dated: June 6, 1949.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Defendant, Oscar R. Ewing, Federal Security Administrator, and to Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, his attorneys:

You Will Please Take Notice that the undersigned will bring the above Motion for Summary Judgment on for hearing before the above entitled Court, in the court room thereof in the United States Post Office Building, 7th and Mission, San Francisco, California, on the 15th day of July, 1949, at the hour of 2:00 o'clock p.m. of said day, or as soon thereafter as counsel can be heard.

Dated: June 6, 1949.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action was brought by the plaintiff to secure a review by this Court of the findings, decisions and awards of the Social Security Administration acting through its Appeal's Council and Referee, made

upon the Application of the plaintiff to said Administration for herself, as a widow and on behalf of her minor children for survivor's insurance benefits under the provisions of the Social Security Act of August 14, 1935, and the amendments thereof of August 10th, 1939 (42 U.S.C.A. 401 to 409).

The complaint of Mary R. Baiocchi rests upon the employment of her deceased husband, Almando Baiocchi, in covered employment for the seventeen calendar quarters that are required by the provisions of 42 U.S.C.A. 409 (g) to make the deceased employee a "Fully Insured individual." This status or that of a "Currently insured individual" is required, among other factors, for the plaintiff, a widow, to recover benefits on her own behalf under 42 U.S.C.A. 402 (e) or benefits for the dependent minor children under 42 U.S.C.A. 402 (c).

Subsequent to the plaintiff's application, as a widow, on behalf of herself and children on July 18, 1945 (Tr. p. 67, Exhibit A), benefits were denied to her. On November 3, 1947, the plaintiff made a request for reconsideration (Tr. p. 72, Exhibit C). On 4 May 1948, your plaintiff requested a hearing (Tr. p. 9, Exhibit B) before the regional referee which hearing was held before Martin Tieburg, a referee of the Federal Security Agency, on May 26, 1948. An adverse decision was rendered by the referee, Martin Tieburg, on June 8, 1948, (See Tr. p. 5 through 9). Plaintiff, herein, requested a review of the Referee's Decision on June 10, 1948, (Tr. p. 3) which request was denied by the Appeals Council on June 29, 1948 (Tr. p. 2).

The decision of the referee is best summed up by the words of the decision itself (Tr. p. 5) wherein the referee states:

"The claimant contends that the services rendered by her husband for the California Prune and Apricot Growers Association were in covered employment and that all of his earnings from such employment should be credited by the Social Security Administration as wages as a result whereof the wage earner would have at the time of his death a fully insured status."

"The benefits applied for by the claimant on behalf of her children are provided for in section 202(c) of the Social Security Act, as amended, and the benefits applied for by the claimant on her own behalf are provided for in section 200(e). The claimant, on her own behalf and on behalf of her children, has satisfied all of the conditions of entitlement under those sections, with the exception of those conditions which require that the wage earner have been, at the time of his death, a fully or currently insured individual." (Emphasis added.)

The referee then adds, at p. 8 of the transcript and p. 4 of his decision, the following observation as to the type of work performed by the deceased employee for the California Prune and Apricot Growers Association:

"From the evidence in this record it appears that the Association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a com-

mercial packer. Rosenberg Brothers was the employer involved in the case of Miller vs. Burger, 161 Fed. 2d. 992, in which case it was held that as processor of dried fruit was not engaged in agricultural labor."

The position taken by the referee, after quoting the definition of "Agricultural labor" found in 42 U.S.C.A. 409(1), was as follows:

"The Social Security Administration has determined that the principles enunciated in the Burger case, (supra), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in 'employment' within the contemplation of the Social Security Act, as amended. The position taken by the Administration is to the effect that services on and after January 1, 1940, in the handling, packing, packaging, processing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of dried fruit, as well as fresh fruit and fresh vegetables, where such handling is for the account of the producer (i.e., where the processor, whether a cooperative or a commercial handler, operates on a fee basis and does not buy the producer's product outright), are excepted services under section 209 (1) (4) of the Social Security Act, as amended."

"The referee, accordingly, finds that the services rendered by the wage earners since January, 1940, as a dried fruit processor, excluding services rendered as a maintenance man, for the California

Prune and Apricot Growers Association, a cooperative association, are excepted as "agricultural labor" under section 209 (1) (4) of the Social Security Act as amended."

The decision of the Administration, refusing to classify Baiocchi's earnings, after January 1st, 1940, as wages within the purview of the Act, is the real basis for the Plaintiff's prayer to this Court to reject the decision of the Administration as a matter of law. As is seen from the referee's decision quoted above, all other facts necessary for the plaintiff's recovery for herself, as a widow, or on behalf of her children, were found in favor of the plaintiff by the Administration, and thus no discussion of those facts is necessary herein. With the exception of the single error of deciding that Baiocchi's services constituted "agricultural labor," the decision of the Social Security Administration is in conformity with the Social Security Act.

Facts

The Social Security Administrator has filed with his answer a complete transcript of the proceedings upon plaintiff's application for insurance benefits, and transcript referees herein and above are to that record.

Almando Baiocchi was employed by the California Prune and Apricot Growers Association, which has filed its articles of incorporation in accordance with California law. The above mentioned corporation will hereafter be referred to as the "Central Sales Agency," as it is called in all of its contracts with

the local corporations. (See Tr. p. 89, Exhibit L.) The Central Sales Agency is then a non-profit corporation composed of some 28 local non-profit corporations, which will hereafter be referred to as "Locals," as they are called in all of their contracts with growers who become members therein. (See Tr. p. 88, Exhibit K.)

The Central Sales Agency employed Almando Baiocchi from the latter part of 1939 to November 4, 1944, (Tr. p. 6). Over that period, he performed services in four separate functions of the operations of the Central Sales Agency i.e., (1) Processing and packing; (2) Receiving and grading; (3) Shipping, and (4) Maintenance (Tr. p. 6).

The fruit handled by Baiocchi was received by the Central Sales Agency in the sulphured, dried state from the Locals to whom title had passed under the contracts between the Local and the members of the Corporation (See Tr. p. 88, Exhibit K). Upon receipt by the Central Sales Agency, title passed from the Local to the Central Sales Agency (See Tr. p. 89, Exhibit L, and p. 48-52). Only thereafter and while in the employment of Central Sales Agency, did Almando Baiocchi process, pack or grade any of the dried fruit.

Baiocchi did not own a ranch, farm, or orchard, or do any agricultural labor, but was a packing house worker throughout. (Tr. p. 8.)

The Central Sales Agency is a packing and processing corporation dealing only with dried fruits. It handles approximately one-third of the prunes

manufactured by farmers in the State of California. (Tr. p. 43.) Its members are 28 local, non-profit corporations and it has some sixteen plants for the receiving, grading, packaging and shipping of prunes in California. It is almost twice as large as any of its competitors in California. (Tr. p. 44.) It has a coverage from as far north as Red Bluff to as far south as Tehachapi Mountains. It has employed as high as 1,574 people at one time and the labor turn over is as high as 102%. (Tr. p. 43-44 and p. 87.) The Central Sales Agency employs graders, processors, packers, electricians, machinists, clerical personnel, salesmen, public relations men, and executives. It does not own any farm, orchard, or ranch nor does it raise, produce, or harvest any fruit. (Tr. p. 58 and 62.) The manufacturing plant in San Jose (pictured in Tr. p. 91, Exhibit M) is located in an area zoned "Heavy Industrial" and is adjacent to and served by transcontinental railroad. The physical operations of the Central Sales Agency corporation are identical with that of the Rosenberg Bros. Corporations (Tr. p. 35 and 36) and in the words of the referee in his decision:

"From the evidence in this record it appears that this Association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of Miller vs. Burger, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor." (Tr. p. 8.)

Dried fruit is produced by the farmers who grow it. The farmer picks the fruit, sulphurs it, dries it or hires others to perform the above services and then delivers it in the dried form to the growers' market, which in this case is the Central Sales Agency. (Tr. p. 39 to p. 41 and p. 47.) The dried fruit is transported to the Local by the grower and there title passes to the Local if the goods are in a deliverable state and are accepted by them. (Tr. p. 88, Exhibit K.) The fruit may be and is co-mingled, after grading, with that of other members. The loss or destruction of the goods would fall upon the corporation that held title at the time of loss. (Tr. p. 88, 89, and 50.) The corporation, Local or Central Sales Agency, in whom title is vested, has an insurable interest and insures the product. The corporation, Local or Central, can pledge, borrow money, or issue warehouse receipts on the dried fruit and at times has. (Tr. p. 48 and 88, 89.)

When the Local turns the dried fruit over to the Central Sales Agency in a merchantable state, after the latter's acceptance, title passes from the Local to the Central. (Tr. p. 89.) Complete payment of the purchase price is postponed, but it is fixed and the Central is subject to the Locals to account according to the contract, bi-laws and statutes. The Central must render bookkeeping services for the Local. (Tr. p. 90.)

The fruit is graded, processed, and packed at the packing houses of the Central Sales Agency. (Tr. p. 36.) It is packed in packages or bulk. (Tr. p. 37.) It is processed and packed by the Central Sales

Agency (Tr. p. 36) upon order. The dried fruit sometimes remains in storage for as long as 18 months before it is packed. (Tr. p. 36.)

The fruit is sold by the Central Sales Agency under its own brands and also under private brands owned by its customers. (Tr. p. 89 and p. 37.) The dried fruit leaves the packing-plant in the same condition as it is when sold to the housewife. (Tr. p. 37 and 39.) About 40% of the prunes are sold in carton or package form and the remainder sold in bulk. (Tr. p. 37.) About 40% of the carton pack is sold to chain stores and about 75% of the bulk pack is sold to chain stores and super-markets. (Tr. p. 38.)

Farmers, in general, now do not sell dried fruit directly to wholesalers or consumers, although this was formerly the trade practice in cracker-barrel days. (Tr. p. 47.) All fruit is now processed and packed before marketing. (Tr. p. 47.) Farmers do not usually perform any of the functions of grading, processing and packing. (Tr. p. 47.)

The California Prune and Apricot Growers Association has desired and does desire that its employees be included within the coverage of the Social Security Act. (Tr. p. 53 and p. 61.) The Central Sales Agency believes it was the intent of Congress to include their employees and during all of the period in question they have continued to make the deduction from wages and have paid taxes pursuant to the provisions of the Social Security Act. (Tr. p. 61 to 63.)

The above facts are established without conflict, and so clearly and distinctly as to prohibit question or contradiction. Neither the Central Sales Agency nor the Local corporations own or operate a farm, or prepare for market any agricultural commodity as an incident to the operation of any farm or agricultural function. The dried fruit purchased by the Central Sales Agency from the local corporations is produced, harvested, sulphured, and dried by the grower on his own ranch as a part of his occupation. It is then sold by the grower to the Local and resold to the Central Sales Agency. Title from the Central Sales Agency to the farmer is twice removed. The farmer's connection with the product has ceased. He has parted with his economic interest in that crop and has only an interest in the sales price.

None of the processes used by the Central Sales Agency are carried on by farmers. They are a part of a highly skilled and complex business enterprise at the terminal market for distribution for consumption. The fruit is sent directly from the packing house to the purchaser. No other market exists between the packing plant and sales office of the Central Sales Agency and the normal channels to consumption.

Upon this clear and uncontradicted evidence, the Referee on June 8, 1948, found that the services rendered by Almando Baiocchi since January 1, 1940, as a dried fruit processor were excepted, as "agricultural labor," under section 209 (1) (4) of the Social Security Act, as amended, and hence the

said deceased employee was not a "fully insured individual." Therefore, the widow's claim on behalf of herself and minor children for benefits was denied. On June 29, 1948, The Appeals' Council denied a request for review of the above decision.

Plaintiff contends that this decision is error and should be reversed as a matter of law.

The Statute Involved

Section 202(e) of the Social Security Act provides:

"(e) (1) Every widow (as defined in section 209(j)) of an individual who died a fully or currently insured individual after December 31, 1939, if such widow (A) has not remarried, (B) is not entitled to receive a widow's insurance benefit, or is entitled to receive primary benefits each of which is less than three-fourths of a primary insurance benefit of her husband, (C) was living with such individual at the time of his death, (D) has filed application for widow's current insurance benefits, and (E) at the time of filing has in her care a child of such deceased individual entitled to receive a child's insurance benefit, shall be entitled to receive a widow's current insurance benefit for each month, beginning with the month in which she becomes so entitled to such current insurance benefits and ending with the month immediately preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to receive a child's insurance benefit, she becomes entitled to receive a primary insurance benefit of her deceased

husband, she becomes entitled to receive a widow's insurance benefit, she remarries, she dies.

(2) Such widow's current insurance benefit for each month shall be equal to three-fourths of a primary insurance benefit of her deceased husband, except that, if she is entitled to receive a primary insurance benefit for any month, such widow's current insurance benefit for such month shall be reduced by an amount equal to a primary insurance benefit of such widow."

42 U.S.C.A. 409(e)

Section 202(c) of the Social Security Act provides in part:

"(c) (1) Every child (as defined in section 209(k) of an individual entitled to primary insurance benefits, or of an individual who died a fully or currently insured individual (as defined in section 209(g) and (h) after December 31, 1939, if such child (A) has filed application for child's insurance benefits, (B) at the time such application was filed was unmarried and had not attained the age of 18, and (C) was dependant upon such individual at the time such application was filed, or, if such individual has died, was dependant upon such individual at the time of such individual's death, shall be entitled to receive a child's insurance benefit for each month, beginning with the month in which such child becomes so entitled to such insurance benefits, and ending with the month immediately preceding the first month in which any of the following occurs:

such child dies, marries, is adopted, or attains the age of eighteen . . ."

42 U.S.C.A. 409(c)

The term "employment," as related to the issues in this case, is defined in Section 209(b) as follows:

"The term 'employment' means any service . . . of whatever nature, performed after December 31, 1939, by an employee for the person employing him . . . except . . ."

"(1) Agricultural labor (as defined in subsection (1) of this section)."

"(10) (A) Service performed in any calendar quarter in the employ of any organization except from income tax under section 101 of the Internal Revenue Code, if——

(i) the remuneration for such service does not exceed $45.00 or

(B) Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101(1) of the Internal Revenue Code."

42 U.S.C.A. 409(b)

Agricultural labor is defined, in subsection (1) of section 209 as follows:

"The term 'agricultural labor' includes all services performed . . .

"(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity including the raising,

shearing, feeding, caring for, training and management of livestock, bees, poultry and fur bearing animals and wildlife.

(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging lumber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm.

(3) In connection with the production or harvesting of maple syrup or maple sugar or any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial

canning or commercial freezing or in connection with any agricultural or horticultural-commodity after its delivery to a terminal market for distribution for consumption."

"As used in the subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards." (Emphasis added.)

The Question to be Decided

I. Did the services performed by Baiocchi in the years, 1940 through November, 1944, for a non-profit corporation in its packing house in San Jose consisting of processing and packing, and receiving and grading dried fruit for the purpose of preparing such dried fruit for sale by the packer to chain stores, cooperatives and super markets constitute agricultural labor within the definition of the Social Security Act, when:

(1) Baiocchi did not own, operate, or work on a farm in connection with cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity.

(2) Baiocchi was not the employee of any owner or tenant or other operator of a farm, in connection with the operator, management, conservation improvement or maintenance of such farm and its tools and equipment.

(3) Baiocchi did not perform any service as an

incident to ordinary farming operations nor as an incident to the preparation of fruits or vegetables for market.

(4) Baiocchi did perform services after delivery to a terminal market for distribution for consumption and after the dried fruit had reached the farmers' or "growers' " market.

II. Would a statute which includes employees of profit corporations in the packing of dried fruits as covered employment and which excludes employees of non-profit corporations in the packing of dried fruits as "agricultural labor" not be unconstitutional as violative of "due process of law" as guaranteed by the 5th Amendment of the United States Constitution, when:

(1) Both corporations render identical services and operate in the same manner.

(2) Both corporations have large clerical and accounting staffs.

(3) The employees of each corporation do identical work.

Argument

I.

The Act Must Be Construed Liberally and All Exceptions to Its Operation Must Be Construed Strictly

That the act should be construed liberally and all exceptions to its operation must be construed strictly

is settled law and requires no exhaustive citation of authority.

When the act was declared constitutional by the Supreme Court of the United States, it was on the basis that Congress was empowered to promote the general welfare; that unemployment was a national evil and that; in the interest of the general welfare, Congress could appropriate funds to remedy the evil.

Helvering v. Davis, 301 U.S. 619, 57 S. Ct. 904.

Steward Machine Company v. Davis, 301 U.S. 548, 57 S. Ct. 904.

The broad purpose of the legislation to remedy the evils of national unemployment shows the way at once to a liberal and broad interpretation of its coverage, purposes and intents.

The Act contained initially certain exceptions founded upon definite reasons of administrative convenience, or of sovereign supremacy, or of public interest. The fact that the classification was not arbitrary resulted in the sustaining of the exceptions against constitutional challenge. One can not help but be impressed with the broad interpretation of the Act given in the above cited leading cases by the learned Justice Cardoza.

This broad interpretation exists today and many excellent opinions of other Judges and Justices express it.

For example, in Grace v. Magruder, 148 Fed. (2d) 679 at 680;

"The . . . persons involved in this case . . . are obviously subject economically to the evils the laws were designed to combat,[8] and the remedies those laws afford are appropriate for preventing or curing the evils."[9]

The Judge then quotes from Judge Parker of the Fourth Circuit Court of Appeals, at p. 681;

"The Social Security Act . . . was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged . . . from the purposes Congress had in mind . . ."

Again speaking through Judge Major of the Seventh Circuit Court of Appeals, in Carroll v. Social Security Board, 128 Fed. 2d. 876 at 881, the same thought finds expression when the court says:

"The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us is aptly stated in Helvering v. Davis. . . . That it should be liberally construed in favor of those seeking its benefits cannot be doubted."

Because of the above well established rule of construction, the rule which is its complement is as clearly settled; namely, the exception to the general scope of the Act is subject to strict construction and should not be extended to unduly restrict the coverage and effectiveness of the legislation.

In Fleming v. Hawk-eye Pearl Button Co., 113 Fed. 2d 52, Judge Gardiner of the Eighth Circuit after stating the above rule of construction quoted from the opinion in U. S. v. Dickson, 15 Pet. 141 at 165:

"In the last cited case it is said: 'In short a

proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.' "

Judge McCormick in Latimer v. United States, 52 Fed. Supp. 228 at 234, phrased the rule of construction forceably as follows:

"Therefore, a realistic approach to the social and economic security of employees in present-day large scale enterprises of all kinds requires that all doubt in construing remedial statutes providing unemployment insurance and old age protection and containing tax expositions should favor coverage rather than exemption."

The above remarks are repeated with approval in the recent and leading case of Miller v. Burger, No. 11480, C.C.A. 9th, June 5, 1947, 161 Fed. (2nd) 992.

Judge Shaw in Cal. E. Com. v. Black Fox Inst., 43 Cal. App. 2nd Supp. 868 at 872, comments:

"It sets up a scheme for ameliorating the hardships of unemployment. . . . In view of the purpose of these provisions, they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation."

The last word in this respect is to be found in the learned opinion of District Judge Mathes in Burger v. Social Security Board, 66 F. Supp. 619 at 626, wherein it is said:

"It is settled that the Social Security Act should be liberally construed in favor of those seeking its

benefits. All doubts of interpretation are to be resolved in favor of coverage."

It is therefore suggested that the rules of construction are established that the Social Security Act should in common with other remedial legislation be liberally construed and that exceptions to its operation must be strictly construed.

II.

The Court, In Construing the Act, Is Not Bound By the Decision of the Social Security Administration

There is no conflict of fact in the case at bar. The facts are clear and obvious and are as reported by the referee. There is no controversy of mixed law and fact. The whole case rests upon a question of law; namely, whether the deceased employee, Almando Baiocchi, performed "agricultural labor" within the meaning of the Act as quoted heretofore. This, it is submitted, is a pure question of law which must be determined by this honorable Court.

In Carroll v. Social Security Board, (Supra) the Seventh Circuit when faced with a similar problem commented:

"Moreover in our view, the rule (that the court is bound by the findings of the Board) has no application, because the question presents an issue of law rather than fact. It involves a construction of the act."

In such a manner, Circuit Judge Bone of the Ninth Circuit, also, in an identical case to the case at bar commented in the case of Burger v. Miller,

No. 11480, June 5, 1947, 161 ed. (2nd) 992 at p. 995:

"While the findings of fact of the Social Security Board are supported by the evidence, we think its decision was incorrect when measured off against the language of the Act and the intent of Congress in adopting the 1939 amendment thereto. The District Court was justified in reversing the decision of the Board . . ."

In the sister case of Miller v. Bettencourt, No. 11501, C.C.A. 9th, June 5th, 1947, 161 Fed. 2nd 995, the same Judge commented at p. 996:

"This being true, as a matter of law, the labor of appellee in the Rosenburg plant was not 'agricultural labor'. . ."

The leading case in this regard is Social Security Board v. Nierotko, February 25, 1946, 327 U.S. 358, 66 S. Ct. 637, 643, wherein it is said:

"An agency may not finally decide the limits of its statutory power. That is a judicial function. . . . The Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissable limits of administrative interpretation."

Thus the Court here may construe and apply the statute in accordance with its language and in view of the broad purpose of the statute, unrestricted by any interpretation of the Social Security Administration.

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Thus the Court here may construe and apply the statute in accordance with its language and in view of the broad purpose of the statute, unrestricted by any interpretation of the Social Security Administration.

III.

The Services Rendered by Baiocchi Were Not Agricultural Labor

It is difficult to see how the Social Security Administration can avoid ruling that the employment of Almando Baiocchi and the other employees of the Central Sales Agency is in covered employment.

In fact, the administration, at first, ruled that it was "abundantly clear" from the Burger and Bettencourt decisions (supra) of the Circuit Courts of the Ninth Circuit, that work of the type done by Baiocchi for the same cooperative employer was in covered employment. (Tr. p. 103, Exhibit R, and Tr. p. 106, Exhibit S.) The administration then, without any reason being given, reversed its decision.

The Referee in his decision of June 8, 1948, commented as follows:

"The Social Security Administration has determined that the principles enunciated in the Burger case, (supra), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in 'employment' within the contemplation of the Social Security Act, as amended. The position taken by the Administration is to the effect that services on or after January 1, 1940, in the handling, packing, packaging, processing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of dried fruit, as well as fresh fruit and fresh vegetables, where

such handling is for the account of the producer (i.e., where the processor, whether a cooperative or a commercial handler, operates on a fee basis and does not buy the producers product outright), are excepted services under section 209 (1) (4) of the Social Security Act, as amended * * * ''

These words should be compared with the referee's finding of fact (Tr. p. 8), wherein the referee states:

''From the evidence in this record it appears that the association performs its functions and handles its produce substantially identical to the manner and methods utilized by Rosenberg Brothers, a commercial packer. Rosenburg Brothers was the employer involved in the case of Miller vs. Burger, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor.''

When the two quotations are contrasted, the position of the Social Security Administration is either one of two alternatives. Either the Administrator is ignoring the Burger and Bettencourt cases and thus forcing the employees of two large dried fruit cooperatives, (the California Prune and Apricot Growers Association and Sunmaid Raisin Growers Association) to take recourse to the federal courts individually at enormous expense to each plaintiff, counsel, court and government to protect their social security benefits, or, as a second alternative, the Social Security Administration has misapplied the law even as they state it.

Considering the first alternative initially. It takes

no exhaustive brief to point out when the facts of this case are identical to the Burger case, (supra), and when the law is constant (the statute and its interpretation remaining the same), the results must be the same. The dried fruit in the Burger case had reached both the "growers' market" and the "terminal market." The referee found the facts to be identical in the case at bar. The dried fruit here also has reached the "growers' market" or the "terminal market." Employment rendered after the fruit had reached the "growers' " market is covered employment and, even though it hasn't reached the "growers' market," if the fruit has reached the "terminal market," services rendered thereafter are in covered employment.

As is intimated in the referee's decision, the administration regards processing services for a cooperative as not covered employment. The word "cooperatives" is not once used in Title II of the Social Security Act (except by indirect reference to the I.R.C.). It is not even mentioned in 42 U.S.C.A. 409 (1), the section which defines "agricultural labor." Is the Administration attempting to legislate a new exception to coverage under the Social Security Act? Neither Congress nor the Courts have ever attempted to distinguish between work rendered for corporations (profit or nonprofit) in defining agricultural labor. The test of "agricultural labor" has always been to the legislature, judiciary, and citizenry a question of the type of work done. (See Tr. p. 100). Moreover,

the statute in question plainly determines the services rendered to be covered employment and not agricultural labor. (A more detailed discussion of the statute will follow later.)

A second explanation of the position taken by the Social Security Administration may be that they have misapplied even their own concept of the law. This is more logical for it is fantastic that the Administration would contemplate administrative legislation as gross as the insertion of a "co-operative" distinction into 42 U.S.C.A. 409 (1). The fact that this misunderstanding might be the case is shown by the referee's explanation (Tr. p. 8) that where the handling is for the account of the producer (i.e. where the processor operates on a fee basis and does not buy the producer's product outright), the adminisration regards the employment to be "agricultural labor."

Erroneous as this may be, it is according to the referee's own words not the case at bar.

In the case at bar, title passed from the grower after he has manufactured the dried fruit and delivered it to the Local, a non-profit corporation. Title then passed from the Local to the Central Sales Agency, another non-profit corporation, before the deceased employee ever packed or processed the fruit for national and international distribution. No fee is charged by the Central Sales Agency and the producer's product is bought outright. The fruit is co-mingled and if a loss without fault occurs, the loss falls upon the corpora-

tion and not the individual Local supplying it or the individual grower supplying it to which ever one of the 28 local corporations that forwarded it. No agency relationship exists in such a situation.

Applying those admittedly true facts to the statement of law by the referee, it is at once apparent that the facts of the case at bar as found by the referee differ from the statement of the law made by the referee and that the services rendered were not agricultural labor.

Thus, in either case, the decision must be reversed as a matter of law, either because the facts are identical with the Burger case (except that the corporation in the case at bar is a non-profit corporation) and no grounds for a statutory distinction between profit and non-profit corporations exist or because applying the Administration's concept of the law the facts of the case as found by the referee require a recovery as a matter of law since the Central Sales Agency was not charging a fee and because the producer's product was bought outright.

Although either of the above alternatives requires a recovery for the complainant herein, counsel for plaintiff can not help but urge this court to place its decision upon the broadest grounds possible; namely, that after the grower manufactures the dried fruit and delivers it to his "market," whether his market be a cooperative, non-profit corporation or when he delivers it to a "terminal market," whether the terminal market be a profit partner-

ship, non-profit corporation, profit corporation, co-operative, or whatever form of business association is used, that the processing, packaging and shipping workers, employees of that business association, are employees entitled to Social Security benefits if they otherwise qualify under the Act.

This request is made for a series of reasons. First, it is a correct statement of the law. Second, Social Security benefits are a vital matter to American citizens and they are bewildered when they discover for a technical reason that they cannot comprehend why they, after contributing to the fund for twelve years, not only cannot draw the benefits but also must withstand the expense of suing in this Court to receive what is rightfully theirs as a matter of law. Third and lastly, counsel for plaintiff herein has devoted four years of his life testifying before congressional committees, appearing as counsel and amicus curiae in the Burger and Bettencourt cases (supra) and representing plaintiff and others herein, on this one small point of law so vitally affecting thousands of workers, widows and children throughout this district. Even now new proceedings are being instituted on behalf of the employees of the Sun Maid Raisin Growers Association and that case, since differing slightly on the facts, unless the case at bar is decided upon the broad and true basis will require counsel again to appear in the District Court on the precise facts of that case.

The time of counsel, the United States Attorney, and of this court should not be wasted. A broad

decision reiterating the Burger rule, as is outlined above, will clarify the entire matter for all of the dried fruit employees of these two corporations without further expensive and time-consuming litigation upon this one minute segment of the law.

It is the plaintiff's contention that the Burger and Bettencourt cases establish that the employees of a terminal market or of a growers' market are not in agricultural labor, but one performing services within covered "employment" under the Social Security Act, as amended, regardless of the business structure of the organization that is the "market" or "terminal market." This used to be the Administration's attitude. (See Tr. p. 100).

This is the square holding in the Burger case, in 66 Fed. Supp. 619 at p. 624, wherein Judge Mathes held:

"Services performed in treating and handling an agricultural commodity after delivery to a terminal market for distribution for consumption unquestionably do not constitute an integral part of farming activities. And it is clear from the last sentence of paragraph (4) of the legislative definition that Congress did not intend to exempt such services as agricultural labor, even when performed for the account of the producer or grower."

"This legislative intent is unambiguously expressed.

"Delivery to a terminal market for distribution for consumption" is fixed by statute as a definitive

boundary. Thus Congress has drawn a line of demarcation across the various pathways followed by agricultural and horticultural commodities in passing from producer to consumer, and has declared that once the commodity reaches the market, from which in ordinary course of trade it next goes into the channels of distribution, any service afterwards performed for any person in treating or handling such commodity does not constitute 'agricultural labor' within the meaning of the act."

The Burger case was affirmed on appeal by the Ninth Circuit on June 5, 1947, in 161 F 2d. 992 and is the law of this circuit. The referee's decision (Tr. p. 8) is squarely contra and must be reversed as a matter of law.

The Burger case also establishes the rule without question that by the term "market," Congress means the grower's market. Up until the "grower's market" is reached, services performed by anyone or any type of business association for the account of the grower or producer was exempt as being "agricultural labor." But as is stated in the Burger case, 66 F. Supp. 619 at p. 626:

"Beyond that point—beyond the normal market of the producer or grower—the commodity must bear the burden of the taxes regardless of who owns it."

There could be no clearer exposition of the law. The decision of the referee (Tr. p. 8) is completely opposed to the statute and must be reversed as a matter of law.

The companion case of Bettencourt v. Social Security Board, 66 Fed. Supp. 629, was similarly treated except that Judge Goodman did not feel it essential to determine that the word "market" as used in 42 U.S.C.A. 409 (1) meant "grower's market."

Both the Burger and Bettencourt cases were appealed by the Social Security Administration and were affirmed in 161 F. 2d. 992 and 161 F. 2nd 995, respectively. In the Burger case, Judge Bone speaking for the court held that the Rosenburg Bros. plant was a "terminal market" and a "market" (held to properly mean a "grower's market") and the decision of Judge Mathes was affirmed. The Bettencourt case was, likewise, affirmed.

One of the findings of fact by the referee in the case at bar was that the Central Sales Agency operated in an identical manner to the Rosenburg Bros. plant. The conclusion is thus inescapable that the administration's decision is wrong as a matter of law and must be reversed.

The fact that Baiocchi worked for a non-profit corporation and Burger worked for a profit corporation is unimportant as is seen in many cases, one of the clearest of which is the recent decision of California Employment Commission vs. Butte County etc. Assn., 25 Cal. 2nd. 624, 154 P. 2d. 892. Speaking of a corporation organized under the same law as the Central Sales Agency and Locals involved therein, the Court therein at p. 636 and 637 said:

"The nature of the defendant's corporate structure is immaterial for 'cooperative corporations are just as distinct an entity as are other private corporations.' (Fletchers Cyclopedia of Corporations (perm. ed.) Vol. I #25, p. 90.) The doctrine of separate entity will be disregarded only to prevent fraud or grave injustice * * * Obviously no such reason exists here for ignoring the plain language of the effective administrative definition—but, on the contrary, to treat the defendant corporation nevertheless as the alter ego of the individual former members would, in fact, promote injustice by unnecessarily restricting the operative scope of the unemployment insurance law of this state, a limitation wholly out of line with the beneficient purpose of such legislation that, consistent with its terms, the coverage provisions have a broad application."

(Emphasis by Court.)

See also in this respect Cowiche Growers, Inc. vs. Bates (1941), 10 Wn. 2d. 585, 117 P. 2d. 624; Employment Security Commission vs. Arizona Citrus Growers (1944), 61 Ariz. 96, 144 P. 2d. 682; H. Duys and Co. v. Tone, 125 Conn. 500, 5A. 2d. 23; Maryland and Virginia Milk Producers Assn. Inc. v. District of Columbia, 73 App. D. C. 399, 119 F. 2d. 787.

The same ruling was made in North Whittier Heights C. Ass'n. v. National Labor Relations Board, 9 Cir., 109 F. 2d. 76. While this latter case

arose in connection with the National Labor Relations Act, 29 U.S.C.A. 151, it was quoted by Judge Bone in the Burger case (161 F. 2d. 992 at 994) as being in point in the "employees of dried fruit packing house" social security type cases. The court in the North Whittier case said:

"Petitioner argues that if each member of the non-profit cooperative corporation that runs the packing house were to personally hire and direct those doing his own packing and sorting, the work would be agricultural and his employees would be agricultural laborers; that it follows, therefore, that in the case of the same members acting under a single organization to accomplish the same results, there can be no change in the nature of the work nor in the status of the persons doing it. The conclusion does not follow. The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it. The premise laid down by the petitioner in this phase of its argument is not, however, the exact situations facing us. The packing house activity is much more than the mere treatment of the product. When it reaches the packing house it is then in the practical control of a great selling organization which accounts to the individual farmer under the terms of the statute law and its own by-laws."

The remarks in the Burger case (66 Fed. Supp. 619 at 626) are directly in point.

Actually, the fact that Baiocchi worked for a

non-profit corporation makes the case even stronger than if he had worked for a profit corporation.

Look to the plain words of the statute. Employment is defined in section 209 (b) broadly as all services, of whatever nature. There are definite exceptions, however. Exception 9 (B) of section 209(b) excepts service performed in employ of an agricultural organization exempt under 101 (1) of the I.R.C. That that is not this case is shown by T.D. Reg. 111-Sec. 29 101(1)-1 which explains that exception as applying to organizations which "(1) Have no net income inuring to the benefit of any member; (2) Are educational or instructive in character; and * * *"

That is obviously not the Central Sales Agency. It does have "net income inuring to the benefit of" all of its members and isn't educational or instructive in character. (Tr. p. 62).

The Central Sales Agency, however, is excepted by sub-section 10(A) of Section 209(b) of the Social Security Act as to services not exceeding $45.00 per quarter. It is exempt from corporate income taxation and has been granted an exemption under the provisions of Internal Revenue Code 101 (12) (See Tr. p. 62). The statute, Section 209(b) 10(A), (Social Security Act) is plain that employment, as defined therein, includes services rendered a corporation exempt under any sub-section of I.R.C. 101 (except I.R.C. 101 (1)) if the remuneration exceeds $45.00 per quarter.

The wording of the amendment to the Social Se-

curity Act in 1939 is plain. "Farmers, fruit growers, or other like associations organized and operated (a) for the purpose of marketing the products of their members or other producers." (I.R.C. 101 (12)) employing workers who earn wages in excess of $45.00 are thus employing employees earning wages in covered employment, within the definition of the Social Security Act. The plain words of this 1939 amendment to 209 (b) show conclusively without doubt that the meaning of the 1939 amendment to 209 (b) was as interpreted in the Burger and Bettencourt cases and that the widow of Almando Baiocchi and his minor children are entitled to their benefits under the Social Security Act as a matter of law. The position of the Social Security Administration is aboslutely without support and not only is wrong as a matter of law, but also has been manifestly unjust to her, and the other employees of the Central Sales Agency, in that she, Mrs. Baiocchi, a widow, has been compelled to wait over a period of three and one-half years for her benefits and for the benefits of her children, obtain the services of counsel to sue in this Court for benefits that are hers unquestionably, as a matter of law; in that, other employees have been compelled to return to the Treasury benefits that they have received and thus thousands of employees' rights are dependent upon the decision of this Court in this test case.

It would seem unnecessary to cite additional authority. Everyone in the west knows that the em-

ployee of the dried fruit packer, whatever the type of business association, is an industrial employee. The Burger and Bettencourt cases stand as the law upon the subject. They are wise decisions and are rendered according to the plain words of the statute and the court's knowledge of the common affairs of industry and business.

The decision of the referee is a surprising ruling since in square conflict with the above decisions. To your plaintiff, the widow of the deceased worker, it was even more surprising than to one trained in the intricacies of law. The usually dry words of the record change into life and significance at page 15 of the transcript when the referee asked the widow if there was anything pertinent to the matter that she should further testify to, and she remarked:

"Well, the thing is that I don't see why they should call that agricultural when that is in the city limits, almost in the middle of the city limits."

These words could perhaps have been better chosen or the phrases more artistically formed, but this widow, plaintiff herein, was trying to ask a government official why she, a widow, after her husband and his employer had contributed to social security from the date of its inauguration until this date, should be denied her widow's benefit and be put to the expense and delay of a trial and law suit. It is, indeed, a difficult question to answer even if it were an original question.

The referee's comment was, therefore, a matter of some delay but the answer was:

"Well, that is something, of course, that is quite technical, * * *"

Counsel for plaintiff is in full accord. To deny the plaintiff her benefits even as an original question would require quite a technical ruling. In light of the Burger and Bettencourt cases, such a technical, nebulous ruling is error as a matter of law and is impossible.

It is, therefore, urged that the decision should be reversed as a matter of law since no service was rendered (1) on a farm, (2) in the employ of the owner or tenant or other operator of a farm. The services rendered here, as in the Burger and Bettencourt cases, were rendered after the dried fruit had reached the grower's market and after delivery of the fruit to a terminal market for distribution for consumption.

IV.

An Interpretation Excluding the Dried Fruit Employees of Cooperatives and Including the Employees of a Commercial Packer Would Make That Section of the Act Unconstitutional.

The chief reason for excepting agricultural labor from social security coverage and other allied remedial legislation has been administrative and accounting problems. No such problems exist in the dried fruit packing house, whether commercial or cooperative. The Central Sales Agency, in question, has a large accounting force and under its contracts renders accounting services for its member corporations. It employs as high as 1500 work-

ers. It is a modern, efficient sales organization competing against other corporations on the open market in a highly competitive business. Moreover, there is no difficulty of collection. As a matter of fact, the money both taxes and contributions have been for twelve years and are now being paid to the Treasury Department.

In this respect, the California Supreme Court in Cal. Emp. Com. v. Butte County etc. Assn. (supra) quoting almost verbatim from Latimer v. U. S. (supra) at p. 231, commented:

"Second, the principal reason for exempting 'agricultural labor' from social and industrial benefits resulting from remedial legislation has been administrative difficulties and accounting inconveniences in farm work (Carmichael v. Southern Coal and C. Co., 301 U.S. 495, (57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327)), but with relation to employment in and operation and management of packing houses by respective associations, no such practical impediment exists. On the contrary, the usual economy, efficiency and skill with which such association units, functioning as adjuncts to agricultural pursuits, are operated by boards of directors and expert business managers, complemented by systematic office service, place them on no different level than other business enterprises insofar as concerns ability to comply with administrative computation procedure under unemployment compensation insurance laws."

The corporation, the court was there discussing

was incorporated under the identical statute as are the corporations, Central and Local, in the case at bar.

As was pointed out in the Burger case (supra) at p. 627 by Judge Mathes:

"Likewise, here as the record clearly reveals the very factors which have been relied upon as constitutional justification for the 'agricultural labor' exemptions are entirely wanting. Carmichael v. Southern Coal and Coke Co., 301 U.S. 495 * * *"

A fortiorari, that is the case here where the packer is a corporation fully as large as Rosenburg Bros. corporation.

A physical distinction between the two corporations is impossible. They both perform identical services, employ the same type of labor to do the same type of work, and have large accounting and clerical staffs.

To deny Social Security Benefits to the employees of one and to grant them to the employees of the other would be arbitrary, capricious, legislation and classification in derogation of due proces of law guaranteed to all persons by the 5th Amendment.

In this respect counsel wishes to point to the following authorities:

Lieper vs. Texas, 139 U.S. 462, Sup. Ct. 277.

Giozza v. Tierman, 148 U.S. 657, 12 Sup. Ct. 721.

U. S. v. Yount, D. C. Pa., 267 Fed. 861.

Steward Machine Co. v. Davis, 301 U.S. 1, 13, 83L. Ed. 441.

U. S. v. Armstrong, D.D., 265 Fed. 683.

U. S. v. New York, Etc. Co. 165 Fed. 742.

Sims v. Rives, 66 App. .C. 24, 84 Fed. 871, cert. denied 298 U.S. 682, 56 S. Ct. 960, 80 L. Ed. 1402.

Lappin v. D. of Col., 22 App. D.C. 68.

V.

That the Interpretation Should Be Such as to Sustain the Act as Constitutional

As is stated in 11 Am. Jur. 96 at p. 725:

"It is an elementary principle that when the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction that would uphold it.[10]"

Cited as the leading cases in this respect are the following cases:

Chippewa Indians v. United States, 301 U.S. 358, 81 L. Ed. 1156, 57 S. Ct. 826;

Anniston Mfg. Co. v. Davis, 301 U.S. 337, 81 L. Ed. 1143, 57 S. Ct. 816;

Crowell v. Benson, 285 U.S. 22, 76 L. Ed. 596, 52 S. Ct. 285;

United States v. La Franca, 282 U.S. 568, 75 L. Ed. 551, 51 S. Ct. 278;

Reiniche v. Northern Trust Co., 278 U.S. 339, 73 L. Ed. 410, 49 S. Ct. 123;

Hooper v. Calif., 155 U.S. 648, 39 L. Ed. 297, 15 S. Ct. 207;

United States v. Howell, 11 Wall 432, 20 L. Ed. 195;

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

It is, therefore, urged that the court construe the statute, herein, broadly and liberally, as the plaintiff has argued.

Such a construction results in the statute being held constitutional and removes any of the "grave doubts on that score." The construction urged will bring justice, equality, and satisfaction to all of the employers and employees and harmonize the scheme of social security worked out so elaborately in this country in the last decade.

Conclusion

In conclusion, plaintiff wishes to point out that the decision of the referee and of the Administration is error as a matter of law. The employer here has identical physical operations to that of Rosenburg Brothers. Burger performed services after the dried fruit had reached the terminal market for distribution for consumption and the grower's market. So did Baiocchi. The plaintiff, therefore, as the widow of Baiocchi, and her minor children are, on the undisputed facts of the case, entitled to the benefits as a matter of law.

That the Burger and Bettencourt decisions are a correct interpretation of section 209 (1) is without question. That they are correct as applied to an employee of a farmers', fruit growers', or like association, who earns over $45.00 per quarter is made conclusive by reference to the plain words of the Act in section 209 (b) (10) (A).

It is further urged that due process of law is being denied the plaintiff herein by force of the Act

if she is excluded from receiving benefits therefrom because her husband was employed by the Central Sales Agency as opposed to Rosenburg Bros., when her husband and his employer contributed to the fund, when Rosenburg Bros. operates in an identical manner as the Central Sales Agency, renders identical services, employs the same type of labor to do the same type of work; when both corporations have large clerical and accounting staffs, and are active competitors.

Such a decision can be avoided by accepting the plaintiff's construction set out herein and should be accepted according to the cardinal rules of constitutional construction, to sustain the act's constitutionality.

Plaintiff, therefore, asks that this honorable court grant her motion for a summary judgment, deny defendant's motion for a summary judgment, and reverse the decision of the Social Security Administration.

/s/ ARTHUR L. JOHNSON,
Attorney for Plaintiff.

Receipt of copy attached.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

Joseph E. McElvain, being duly sworn deposes and says that he has been chairman of the Appeals

Council of the Social Security Administration, Federal Security Agency, since February, 1940; that as such chairman, he has knowledge of all actions brought since that date under section 205(g) of the Social Security Act [42 U.S.C. 405(g)], to review decisions of the Appeals Council; that in no action brought under that section has any motion ever been made similar to the motion referred to in the letter of August 2, 1949, addressed by Arthur L. Johnson, Attorney for the plaintiff in the above-entitled action, to the Honorable George B. Harris, Judge of the United States District Court, Post Office Building, San Francisco, California, which letter is now a part of the files of this court. Said letter, together with copies of two letters addressed to Arthur L. Johnson, referred to on page 3 thereof and attached thereto, one from Arthur J. Altmeyer, Chairman, dated February 16, 1945, and one from Robert F. Wagner dated March 20, 1945, is made a part of this affidavit by specific reference thereto.

/s/ JOSEPH E. McELVAIN,
Chairman.

Subscribed and sworn to before me this 18th day of August, 1949.

[Seal] /s/ SARAH H. NAPIER,
Notary Public.

My commission expires Nov. 15, 1951.

Appendix

In the District Court of the United States for the Eastern District of Washington, Northern Division
No. 425 and 441, Consolidated

COLFAX GRAIN GROWERS, INC., and
OAKESDALE GRAIN GROWERS, INC.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came regularly on for trial on the 10th day of May, 1945, before the above-entitled Court sitting without a jury, Donald L. Burcham appearing as attorney for plaintiffs and Harvey Erickson and Thomas R. Winter appearing as attorneys for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

1. That plaintiffs are farmers cooperative associations organized under the "Cooperative Marketing Act" of the State of Washington operating warehouses, elevators and pea processing plants for the purpose of handling, processing, grading, stor-

ing or delivering to storage or to market or to a carrier for transportation to market of agricultural commodities, and that it employs employees in performing said services.

2. That the members and patrons of said associations are farmers and owners of farms and said services are performed on products produced by the members and patrons in the ordinary course of farming operations and as an incident to farming operations.

3. That said services are of the character ordinarily performed by the employees of farmers cooperative organization as a prerequisite to the marketing, in its unmanufactured state, of agricultural commodities produced by the members of such farmers organization or group.

4. That plaintiff Oakesdale Grain Growers, Inc., erroneously paid the Excise Tax on Employers under the Federal Unemployment Tax Act in the following sums for the following years:

1940, $21.83; 1941, $23.79; 1942, $43.11.

5. That plaintiff Colfax Grain Growers, Inc., erroneously paid the Excise Tax on Employers under the Federal Unemployment Tax Act in the following sums for the following years, to-wit:

1940, $44.47; 1941, $66.92; 1942, $118.18.

6. That the services performed by employees of plaintiffs in handling processing, grading, storing, delivering to storage or to market or to a carrier for transportation to market of agricultural commodities are exempt from taxation under said Act.

From the Foregoing Findings of Fact the Court makes the following

Conclusions of Law

1. That plaintiff Oakesdale Grain Growers, Inc., is entitled to judgment against the United States of America in the sum of $88.73.

2. That plaintiff Colfax Grain Growers, Inc., is entitled to Judgment against the United States of America in the sum of $229.57.

3. That Defendant take nothing on its counterclaim against either of said plaintiffs.

Done in open Court this 25th day of June, 1945.

L. B. SCHWELLENBACH,
Judge of said District Court.

Presented by:

DONALD BURCHAM,
Attorney for Plaintiffs,
HARVEY ERICKSON.

In the District Court of the United States for the Eastern District of Washington, Northern Division

Civ. 425

COLFAX GRAIN GROWERS, INC.,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, and CLARK SQUIRE, Collector of Internal Revenue at Tacoma, Washington,
Defendants,

and

Civ. 441

OAKESDALE GRAIN GROWERS, INC.,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, and CLARK SQUIRE, Collector of Internal Revenue at Tacoma, Washington,
Defendants.

MEMORANDUM OF THE COURT

I am convinced that the Plaintiffs are entitled to recover in these cases. The employees referred to were engaged in receiving wheat and other grain, either sacked or in bulk. They weighed and graded it and loaded it onto trucks or railroad cars. It is undisputed that the plaintiffs are non-profit co-operatives organized properly under the laws of the State of Washington. Congress, in the Act of August 10, 1939, excluded agricultural labor and

attempted to define agricultural labor as all service performed "in handling, planting, drying, packaging, processing, freezing, grading, storing or delivering to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only if such service is performed as an incidence to ordinary farming operations." Sec. 1607 subd. 4. The phrase "but only if such service is performed as an incidence to ordinary farming operations" concededly requires interpretation. As it often the case, the necessity for such interpretation comes from the intentional legislative vagueness induced by expediency in the process of the legislative maneuvering. Gray, Nature and Sources of the Law (2d Ed.) 173. Interpretative regulations were characterized by Mr. Justice Jackson, in White v. Winchester Country Club, 315 U.S. 32, 41, as constructional crutches the value of which lies in the fact that they are "substantially contemporaneous expressions of opinion of men who were active in the drafting of the statute." See, also, United States v. American Trucking Associations, 310 U.S. 534, 542.

Faced with the necessity of interpreting this language, Regulation 107 of the Bureau of Internal Revenue, Sec. 403.208 (e) (1) was promulgated as follows:

"(e) Services described in section 1607 (1) (4) of the Act.—(1) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting,

drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity, other than fruits and vegetables . . . produced by such farmer or farmer-members of such organization or group of farmers are excepted, provided such services are performed as an incident to ordinary farming operations. Generally services are performed 'as an incident to ordinary farming operations' within the meaning of this 'paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed 'as an incident to ordinary farming operations.' "

Under the statute and regulation, the question posed is whether or not the services rendered by the employees of these plaintiffs are "services of the character ordinarily performed by the employees

of a farmer or of a farmers' cooperative organization as a prerequisite to the marketing in its unmanufactured state of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group." This question must be answered in the affirmative. Farm cooperatives in the United States universally engage in precisely the type of work performed by plaintiffs' employees. Defendants' counsel contend that the regulation should be limited in its interpretation to services performed by farm cooperatives in the actual operation of farms. So far as I know, North China is the only place in the world where farmers' cooperatives generally engage in such operations. (See "Cooperative Enterprise in Europe," a Report of the Inquiry on Cooperative Enterprises to the President, February, 1937; "The English Cooperatives," Elliott; Sanders, "Organizing a Farmers' Cooperative," Farm Credit Administration Cir. C-108, 1939).

Defendants protest that this interpretation would give to the farmers' cooperatives an unfair advantage over privately owned warehouses. Since the passage of the War Revenue Act of 1898, which exempted farmer cooperative associations from the payment of certain taxes, the Congress has given special statutory recognition to the important cooperatives forty-two times. See, "Legal Phases of Cooperative Associations," Hulbert, p. 307, et seq.; "Abstracts of the Laws pertaining to cooperatives," Ostrolenk and Tereshtenko, p. 315-340, inc. The

reasons behind these statutory distinctions between farmers' cooperatives and others were explained by the Supreme Court in Tigner v. Texas, 310 U.S. 141, as follows: "Since Connolly's case (Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S. Ct. 431, 431, 46 L.Ed. 679), was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation. * * * At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers." It is true that between 27 to 38% of the business of these plaintiffs was with non-members. That, however, does not change the situation. A similar question was raised in Board of Trade of City of Chicago v. Wallace, 7th Cir., 67 F. 2d 402, 407. The court there held that the standard of 50% set by the Congress in the Capper-Volstead Act, 7 U.S.C.A.

Sec. 291, subparagraph 3, controlled. For complete discussion of this question, see Bowles v. Inland Empire Dairy Association, 53 F. Supp. 210, 217.

Judgments will be entered for the plaintiffs in these cases.

L. B. SCHWELLENBACH,
United States District Judge.

June 20, 1945.

[Endorsed]: Filed August 22, 1949.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28187-H

MARY R. BAIOCCHI,

Plaintiff,

vs.

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,

Defendant.

OPINION

Plaintiff, widow of a former employee of the California Prune and Apricot Gowers Association, seeks to review the decision of the Social Security Administration, made upon plaintiff's application for herself and two minor children for survivors' insurance benefits under the Social Security Act of

August 14, 1935, and amendments (42 U.S.C.A. 401-409).[1] Her case is submitted on a Motion for Summary Judgment, there being no dispute as to the facts.

Plaintiff's husband was employed by the California Prune and Apricot Growers Association. This association is a co-operative corporation which will hereafter be called the Central Sales Agency. It serves as a marketing organization for twenty-eight local non-profit corporations, hereafter called Locals, through which individual grower members handle their produce.

The Central Sales Agency is a packing and processing corporation dealing only with dried fruits which it receives from the Locals in a sulphured, dried state. It handles about one-third of the prunes in California. It has sixteen plants for receiving, grading, packaging and shipping prunes. It is almost twice as large as any of its competitors. It employs processors, packers, clerical personnel, public relations personnel and executives. It does not own any farm, orchard or ranch; it neither raises produce nor harvests any fruit. The plant, in which decedent worked, is located in a heavy industrial area in San Jose. Its operations are identical with those of the Rosenberg Brothers Corporation. (See Miller v. Burger, infra.)

When Locals turn dried fruit over to the Central Sales Agency the fruit is in a merchantable state.

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[1]See 42 U.S.C.A. 409-G; 42 U.S.C.A. 402(e); 42 U.S.C.A. 402(c).

Title to the fruit passes to the Central Sales Agency upon delivery from the Locals, which acquire it from the individual members of the corporations. Payment of the purchase price is postponed, but it is fixed and the Central Sales Agency is subject to account to the Locals according to contract, by-laws and statute. Fruit sometimes remains in storage at the Central Sales Agency for as long as eighteen months. It is sold under its own brands and also under private brands owned by its customers. When dried fruit leaves the packing plant it is in the same condition as when it is sold to the housewife. About 40% of the carton pack is sold to chain stores; about 75% of the bulk is sold to chain stores and super markets.

Specifically, the functions performed by the decedent for the Central Sales Agency were: (1) receiving and grading; (2) processing and packing; (3) shipping; (4) maintenance.

The Central Sales Agency for more than twelve years has made payments of taxes and collected contributions from employees in accordance with the provisions of the Social Security Act. It has acted voluntarily to protect its employees, convinced that their work falls within the coverage of the Act. The instant case is not brought at the behest of the cooperative but is necessitated by the interpretation placed upon social security coverage by the Administration.

The specific question for decision is whether plaintiff's deceased husband was an employee of an

organization included within the terms of the Social Security Act.

The pertinent part of the Social Security Act whose coverage is in dispute defines agricultural labor as follows:

"The term 'agricultural labor' includes all services performed . . . (4) in handling, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity; but only as such service is performed as an incident to ordinary farming operations or, in the case of fruits or vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." (42 U.S.C.A. 409 (b)). (Underscore ours.)

Did the decedent, whose work in the packing house in San Jose consisted of receiving, grading, processing and packing dried fruit for purposes of preparing it for sale to chain stores, cooperatives, and super markets, and doing maintenance work, constitute agricultural labor within the above definition of the Social Security Act?

From the undisputed statement of facts, it is clear decedent worked for a terminal market for distribution for consumption after the dried fruit had reached the grocer's or terminal market.

In construing legislation, such as the Social Security Act, it is axiomatic that the Court should be liberal in its interpretation (Grace v. Magruder, 148 Fed. 2d, 679; Latimer v. U. S., 52 Fed. Supp. 228; Burger v. Social Security Board, 66 Fed. Supp. 619). Furthermore, this Court is free to make its own determination of the scope of the Statute (Social Security Board v. Nierotko, 327 U. S. 358).

The task of analyzing and construing the sections of the Social Security Act, whose meaning gives rise to the present controversy, has been simplified by two recent rulings by the Court of Appeals for the Ninth Circuit. In cases which closely parallel the instant suit, the Appellate Court has held that work performed in employment identical with that of decedent in a processing and packaging plant is "covered" employment within the meaning of the Social Security Act. This is the holding in Miller v. Burger, 161 Fed. 2d 992, and Miller v. Bettencourt, 161 Fed. 2d, 995. In the Bettencourt case the Court held that the plant in which Bettencourt worked was a "terminal market" for the farmer producers who sold and delivered their dried fruit to that concern. As the Court stated at p. 994: "Facts make abundantly clear that it was only after the farmer producer sold and delivered the fruit to Rosenberg Brothers, that Bettencourt's services . . . were performed for that commercial concern. In this state of the record we regard his services as being performed after all 'agricultural labor' in connection with such dried fruit had ceased." Ac-

cordingly, the Court found that the plaintiff was entitled to coverage under the Social Security Act, affirming Judge Mathes and referring to his opinion in Burger v. Security Board, supra.

The only basis urged for distinguishing the case at bar from the Burger and Bettencourt cases is the cooperative status of the Central Sales Agency for whom plaintiff's deceased husband worked. This distinction is not sound. In North Whittier Heights Citrus Association v. National Labor Relations Board, 109 Fed. 2d, 76, the Court of Appeals for the Ninth Circuit held that a cooperative similar to that for which decedent worked was not one engaged in agriculture to such an extent that its employees would be considered "agricultural laborers" within the exemptions of the National Labor Relations Act. The reasoning in the North Whittier case applies with equal force herein.

The Social Security Act makes no distinction between cooperatives and other forms of corporations in defining its coverage. While defendant has explored the possibility of making out a technical case in favor of its position, viz. that employees of the Central Sales Agency are indirectly employees of the individual farmer members who belong to the local cooperatives, this Court is not prepared to base its decision on strained legal niceties. Even on the distinguishing features which defendant seeks to emphasize between the Central Sales Agency and a profit corporation, there is authority for holding that the attributes of the two types of

corporations are similar for many legal purposes, including coverage under social security legislation. See California Employment Commission v. Butte County Association, 25 Calif. 2d, 624, 154, P. 2d 892.

The basic reason for excluding agricultural laborers from coverage of the Act is to be found in the solicitude of Congress for the small farmer who is ill-equipped to maintain complex records on laborers who are hired on a strictly seasonal basis. Obviously the Central Sales Agency, which employs as many as 1500 workers and has a complete accounting staff is not in the category of the individual farmer who requires freedom from bookkeeping responsibilities.

The Court concludes that plaintiff's deceased husband was employed in a plant whose workers are covered by the Social Security Act. Plaintiff is entitled to recover on behalf of herself and her two minor children as prayed for, upon preparation of findings of fact and conclusions of law in accordance with this opinion.

Dated: December 8, 1949.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed December 9, 1949.

[Title of District Court and Cause.]

ORDER

The above-entitled action came on to be heard on the motion of the plaintiff for a sumary judgment there being no dispute as to the facts; the plaintiff being represented by Arthur L. Johnson and Robert Morgan and the defendant, Oscar R. Ewing, Federal Security Administrator, appearing by Frank J. Hennessy, Charles E. Collett and Newell A. Clapp, and Edward H. Hickey, Hubert H. Margolies and L. B. Zeisler appearing of counsel; the matter having been submitted on briefs, the Court being fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed:

1. The plaintiff's motion for summary judgment be and it is granted.

2. The decision of the Social Security Administration is reversed and the cause is remanded with directions to recompute the benefits to which the plaintiff and her minor children are entitled under the Social Security Act and in accordance with the opinion herein rendered.

Dated this 10th day of January, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form, as provided in Rule 5(c).

FRANK J. HENNESSY,
United States Attorney,
By /s/ C. ELMER COLLETT.

[Endorsed]: Filed January 11, 1950.

In the District Court of the United States in and for the Northern District of California, Southern Division

No. 28187-H

MARY R. BAIOCCHI,

Plaintiff,

vs.

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR,

Defendant.

SUMMARY JUDGMENT

The above-entitled action came on to be heard on the motion of the plaintiff for a summary judgment there being no dispute as to the facts; the plaintiff being represented by Arthur L. Johnson and Robert Morgan and the defendant, Oscar R. Ewing, Federal Security Administrator, appearing by Frank J. Hennessy, Charles E. Collett and Newell A. Clapp, and Edward H. Hickey, Hubert H. Margolies and L. B. Zeisler appearing of counsel; the matter having been submitted on briefs, the Court being fully advised in the premises and the Court having entered its order herein granting the plaintiff's motion:

It is Hereby Ordered, Adjudged and Decreed that the decisions of the Federal Security Agency, Social Security Administration, upon the applications of the plaintiff on behalf of herself and her two minor

children for her widow's current insurance benefit and for minor children's benefits, #12-1093, 12-1094, and 12-1095 are hereby set aside and reversed and the said cases remanded to the Social Security Administration.

Dated this 10th day of January, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form, as provided in Rule 5(c).
FRANK J. HENNESSY,
United States Attorney,
By /s/ C. ELMER COLLETT.

Eentered in Civil Docket Jan. 11, 1950.

[Endorsed]: Filed January 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the defendant, Oscar R. Ewing, Federal Security Administrator, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order and Summary Judgment entered by the United States District Court for the Northern District of California, on January 11, 1950, reversing and setting aside the decisions of the Federal Security Agency, Social

Security Administration, Nos. 12-1093, 12-1094 and 12-1095.

Dated February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney,
/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant, having taken an appeal from the Order and Summary Judgment made and entered herein on January 11, 1950, to the United States Court of Appeals for the Ninth Circuit, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal:

1. Complaint for Review of Decision of Social Security Administration;

2. Answer, including the transcript of the administrative record made a part thereof;

3. Plaintiff's motion for summary judgment;

4. Opinion of George B. Harris, United States District Judge, filed December 9, 1949;

5. Order granting motion for summary judgment filed January 11, 1950.

6. Summary judgment filed January 11, 1950.

7. Affidavit in opposition to plaintiff's motion for attorneys fees, of Joseph E. McElvain, together with attachments thereto, filed August 22, 1949.

8. Notice of Appeal.

9. Designation of the Record.

Dated: February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY DEFENDANT ON APPEAL

The defendant, having taken an appeal on February 14, 1950, to the United States Court of Appeals for the Ninth Circuit from the Order and Summary Judgment made and entered herein by the United States District Court on January 11, 1950, hereby makes the following statement of points to be relied upon in the prosecution of said appeal:

The District Court erred:

1. In failing to hold that the services performed by the deceased wage earner Almando Baiocchi for the California Prune and Apricot Growers Association were properly considered by the Federal Security Administrator to be "agricultural labor" as defined in Section 209 (1) (4) of the Social Security Act as amended (42 U.S.C. 409 (1) (4)) and in the corresponding tax statute. Chapter 9A of the Internal Revenue Code, 26 U.S.C. 1426(h) (4), so that payments he received therefore subsequent to December 31, 1939, were properly excluded from wage credits.

2. In holding that the California Prune and Apricot Growers Association was a terminal market for distribution for consumption.

3. In holding that the deceased wage earner's work was performed after the dried fruit had reached (a) the grower's market or (b) the terminal market.

4. In holding that the court was free to make its own determination of the scope of the Statute without proper regard for the practice evolved by the Federal Security Agency and the Bureau of Internal Revenue in coordinating the administration of the tax and benefit provisions, which had a reasonable basis in law.

5. In concluding that the decsions of this Court in Miller v. Burger, 161 F. (2d) 992, and Miller v. Bettencourt, 161 F. (2d) 995, dealing with the

workers of a commercial handler purchasing fruit outright, are controlling with respect to the coverage of workers of a nonprofit farmers cooperative organized for the sole purpose of marketing their crop, i.e., disposing of the farmer's crop for him.

6. In substituting its own views of "agricultural labor" for the statutory definition adopted by Congress for Title II of the Social Security Act and the corresponding tax provisions.

7. In substituting the views of this Court in North Whittier Heights Citrus Association v. National Labor Relations Board, 109 F. (2d) 76, for the statutory definition adopted by Congress for Title II of the Social Security Act.

8. In disregarding the Federal Security Administrator's findings and finding independently and without support in the record that when locals turn dried fruit over to California Prune and Apricot Growers Association (1) it is in a merchantable state and (2) payment of the purchase price is then fixed although postponed.

9. In holding that the Social Security Act makes no distinction between nonprofit farmers cooperatives and commercial handlers, and thereby (a) nullifying the exception of services such as grading, processing and packing, incident to the preparation of fruits and vegetables for market, without regard to the Congressional purpose as established by the legislative history of the 1939 amendments to the Social Security Act and to the respect due

the expertness of the Federal Security Agency, and (b) invalidating the Regulations promulgated by the Social Security Administration.

10. In not holding that the farmer's economic concern over the return on his fruit is not at an end when his fruit reaches the cooperative and that he has not "parted with economic interest in its future form of destiny."

11. In not holding that the California Prune and Apricot Growers Association was an agent rather than a buyer or middleman, and that services for the Association were for the account of the growers.

12. In permitting the coverage of Title II of the Social Security Act and its artificial statutory definition of "agricultural labor" to be extended by the voluntary contributions of the California Prune and Apricot Growers Association.

13. In mistakenly assuming that the basic reason for excluding processing workers from coverage under the 1939 amendment to the Social Security Act was the difficulty the small farmer has in keeping records instead of the desire to relieve the smaller farmer from the impact and incidence of taxes imposed on fruit and vegetable processing which might be passed back to him, although large growers doing their own processing would not be subject to employment taxation and would thereby obtain a competitive advantage.

14. In granting plaintiff's motion for summary judgment, denying defendant's motion, and in reversing and remanding the cause.

Dated: February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Review of Decision of Social Security Administration

Answer.

Certification of Federal Security Administration.

Motion for Summary Judgment.

Affidavit in Opposition to Plaintiff's Motion for Attorney's Fees.

Opinion.
Order.
Summary Judgment.
Notice of Appeal.
Designation of Record on Appeal.
Statement of Ponts to Be Relied on by Defendant on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF FEDERAL SECURITY ADMINISTRATOR

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Federal Security Agency, under authority conferred upon me by the Federal Security Administrator, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Mary R. Baiocchi on her own behalf for widow's current insurance benefits and on behalf of Leola D. and Geraldine Baiocchi for child's insurance benefits under Title II of the Social Security Act, as amended, based

14. In granting plaintiff's motion for summary judgment, denying defendant's motion, and in reversing and remanding the cause.

Dated: February 14, 1950.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed February 15, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Complaint for Review of Decision of Social Security Administration

Answer.

Certification of Federal Security Administration.

Motion for Summary Judgment.

Affidavit in Opposition to Plaintiff's Motion for Attorney's Fees.

Opinion.
Order.
Summary Judgment.
Notice of Appeal.
Designation of Record on Appeal.
Statement of Ponts to Be Relied on by Defendant on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of March, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF FEDERAL SECURITY ADMINISTRATOR

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Federal Security Agency, under authority conferred upon me by the Federal Security Administrator, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Mary R. Baiocchi on her own behalf for widow's current insurance benefits and on behalf of Leola D. and Geraldine Baiocchi for child's insurance benefits under Title II of the Social Security Act, as amended, based

on the wages of the wage earner, Almando Baiocchi, such transcript including application for benefits, testimony and evidence upon which the decision of the Referee of the Appeals Council of the Social Security Administration was based.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of letter dated June 29, 1948, addressed to claimant (plaintiff) enclosing copy of Appeals Council's Denial of Request for Review of Referee's Decision.

(2) Copy of Denial of Request for Review.

(3) Copy of Request for Review of Referee's Decision.

(4) Copy of letter dated June 8, 1948, addressed to claimant (plaintiff) enclosing copy of Referee's Decision.

(5) Copy of Referee's Decision.

(6) Copy of letter dated May 20, 1948, addressed to referee by Arthur L. Johnson, Attorney at Law, relating to waiver of ten-day notice of hearing.

(7) Copy of Request for Hearing.

(8) Copy of Transcript of Hearing held on May 26, 1948.

The following documents are attached to the above-mentioned transcript as exhibits introduced in evidence before the referee:

(9) Copy of Application of Widow, and Widow on Behalf of Child, for Survivors Insurance Benefits dated July 18, 1945. (Exhibit A)

(10) Copy of Social Security Administration Wage Record of A. Baiocchi. (Exhibit B)

(11) Copy of Request for Reconsideration dated November 8, 1947. (Exhibit C)

(12) Copy of wage record of Almando Baiocchi for services rendered the California Prune and Apricot Growers Association from February 1, 1941, to and including November 4, 1944. (Exhibit D)

(13) Copy of letter dated March 26, 1948, addressed to claimant (plaintiff) by Joseph C. Columbus, Chief, Area Office. (Exhibit E)

(14) Copy of Report of Contact dated April 28, 1948, with Thomas Miller, Secretary, California Prune and Apricot Growers Association. (Exhibit F)

(15) Copy of letter dated April 29, 1948, addressed to the Social Security Administration by T. O. Kluge, General Manager, California Prune and Apricot Growers Association. (Exhibit G)

(16) Copy of statement of earnings of claimant (plaintiff) for services rendered Richmond-Chase Company from 1945 to 1947, inclusive, together with statement of earnings of Leola and Geraldine Baiocchi for U. S. Products Company and Hershel Company in 1945, 1946 and 1947. (Exhibit H)

(17) Copy of letter dated October 22, 1947, addressed to Social Security Administration by T. O. Kluge, General Manager California Prune and Apricot Growers Association. (Exhibit I)

(18) Copy of letter dated May 25, 1948, addressed to Mr. Arthur L. Johnson by R. G. Wells, Personnel Director, California Prune and Apricot Growers Association. (Exhibit J)

(19) Copy of Prune Marketing Agreement for use by California Prune and Apricot Growers Association and Grower. (Exhibit K)

(20) Copy of Local-Central Contract used by California Prune and Apricot Growers Association. (Exhibit L)

(21) Copy of photograph of Plant No. 11 of California Prune and Apricot Growers Association located in San Jose, California. (Exhibit M)

(22) Copy of mimeographed copy of Treasury Department Coll. No. 6219 dated December 31, 1947. (Exhibit N)

(23) Copy of mimeographed copy of Treasury Department Coll. No. 6239 dated March 1, 1948. (Exhibit O)

(24) Copy of Federal Rulings Affecting Subchapters A and C, Chapter 9, of the Internal Revenue Code, 487-S.S.T. 405. (Exhibit P)

(25) Copy of Federal Rulings Affecting the Social Security Act, 8-S.S.T. 10. (Exhibit Q)

(26) Copy of Decision and Notice of Decision of Appeals Council, Social Security Administration, Federal Security Agency, in the case of Edgar T. Penn, Case No. 12-139, issued July 15, 1947. (Exhibit R)

(27) Copy of Decision and Notice of Decision of Appeals Council, Social Security Administration, Federal Security Agency, in the case of Marguerite K. Grimley, Case No. 12-92, issued July 16, 1947. (Exhibit S)

(28) Copy of Revised Decision and Notice of

Decision of Appeals Council, Social Security Administration, Federal Security Agency, in the case of Marguerite K. Grimley, Case No. 12-92, issued May 14, 1948.

(29) Copy of Articles of Incorporation and By-Laws of California Prune and Apricot Growers Association with certification by Secretary dated June 1, 1948. (Exhibit U)

(30) Copy of Articles of Incorporation and By-Laws of Glenn County Prune and Apricot Growers, Inc. with certification of Secretary of California Prune and Apricot Growers Association dated June 1, 1948. (Exhibit V)

In Witness Whereof, I have hereunto set my hand and caused the seal of the Federal Security Agency to be affixed in the City of Washington, District of Columbia, this 9th day of September, 1948. By direction of the Federal Security Administrator.

[Seal] /s/ JOSEPH E. McELVAIN,

Chairman, Appals Council, Social Security Administration, Federal Security Agency.

Federal Security Agency
Social Security Administration
Washington Zone 25

09:AC
June 29, 1948

In the Case of Mary R. Baiocchi and on behalf of Leola D. and Geraldine Baiocchi, Claimants; Almando Baiocchi, Wage Earner; Social Security Account No. 552-14-0672.

Mrs. Mary R. Baiocchi
221 Cleaves Avenue
San Jose, California

Dear Mrs. Baiocchi:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claims for widow's current insurance benefits and for child's insurance benefits on behalf of Leola D. Baiocchi and Geraldine Baiocchi. Your Request for Review having been denied, the referee's decision stands as the final decision of the Office of Appeals Council, Social Security Administration, Federal Security Agency.

If you desire a review of the referee's decision by a court, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the

district court, your attention is directed to section 205(g) of the Social Security Act, as amended.

Sincerely yours,

JOSEPH E. McELVAIN,
Chairman.

Enclosure
c/o Referee Tieburg
F. O. San Jose, California
Mr. Arthur L. Johnson
Attorney-at-Law
202 Porter Building
2nd and Santa Clara Streets
San Jose 20, California

mp:mp
740890
Registered
[Sent] [1*]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Denial of Request for Review

In the Case of Mary R. Baiocchi (Claimant), Case No. 12-1093. Claim for Widow's Current Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Leola D. Baiocchi (Claimant), Case No. 12-1094. Claim for Child's Insurance Benefits.

*** Page numbering appearing at top of page of original certified Transcript of Record.**

In the Case of Mary R. Baiocchi on Behalf of Geraldine Baiocchi (Claimant), Case No. 12-1095. Claim for Child's Insurance Benefits.

In the Case of Almando Baiocchi (Wage Earner), Social Security Account No. 552-14-0672.

These cases are before the Appeals Council upon the claimant's Request for Review of the Referee's Decision, rendered on the 8th day of June, 1948. We are of the opinion that a review of the referee's decision would result in no advantage to the claimants; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Date: June 29, 1948.
ERB—6/29/48.

Federal Security Agency
Social Security Board

Office of Appeals Council

Request for
Review of Referee's Decision

In the Case of Mary R. Baiocchi (Claimant); Almando Baiocchi (Wage Earner), Social Security Account No. 552-14-0672). Claim for Widow's Current Insurance Benefits and Minor Children's Benefits.

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

I contend that all of my deceased husband's work was not agricultural work in any sense for the reasons set forth in my "Request for Hearing," dated May 4, 1948, which reasons are hereby reaffirmed and incorporated herein as if here set forth in full.

/s/ MARY R. BAIOCCHI,
221 Cleaves Avenue,
San Jose, California.

/s/ ARTHUR L. JOHNSON,
Attorney for Applicant and the other wage earners affected by the decision, and their dependents.

Date June 10, 1948. [2]

Acknowledgment of Request for Review of Referee's Decision

Your request for review of the referee's decision in this case was filed on June 11, 1948, at San Jose, Calif. The Chairman of the Appeals Council will notify you of the Council's action on your request.

(For the Social Security Board.)
By /s/ JOHN J. CASSIDY,
Manager,
San Jose, California.

To Appeals Council. [3]

Administration
Case 12-1093-94-95
CO:RO:XII

Notice of Decision

443 Federal Office Building
80 Fulton Street
San Francisco 8, California
June 8, 1948.

Mrs. Mary R. Baiocchi
221 Cleaves Avenue
San Jose, California

Dear Mrs. Baiocchi:

Enclosed is a copy of my decision in your case which is that you are not entitled to the Widow's Current Insurance Benefits and Child's Insurance Benefits for which you applied.

If you disagree with my findings of fact or application of the law, as stated in this decision, you may request that it be reviewed by the Appeals Council of the Social Security Administration. Such request, however, must be made in writing and filed within thirty days from the date of this letter, and may be filed at any field office of the Social Security Administration.

If you have any question about this decision, or desire further information regarding its review, I

suggest that you write to or call at the nearest field office of the Social Security Administration.

Sincerely yours,

/s/ MARTIN TIEBURG,
Referee.

Enclosure

cc: Mr. Arthur L. Johnson
San Jose, California
Mr. Gerald H. Hagar
Oakland, California
Appeals Council, Washington, D. C.
San Francisco Area Office
Field Office, San Jose, California. [4]

Federal Security Agency
Social Security Administration

Office of Appeals Council

REFEREE'S DECISION

In the Case of Mary R. Baiocchi (Claimant), Case No. 12-1093. Claim for Widow's Current Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Leola D. Baiocchi (Claimant), Case No. 12-1094. Claim for Child's Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Geraldine Baiocchi (Claimant), Case No. 12-1095. Claim for Child's Insurance Benefits.

In the Case of Almando Baiocchi (Wage Earner), Social Security Account No. 552-14-0672.

Mary R. Baiocchi, claimant herein on her own behalf, and on behalf of her children Leola D. Baiocchi and Geraldine Baiocchi, disagreed with the determination of the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, by which determination her application for benefits was disallowed and filed a request for a hearing before a referee of the Social Security Administration. Such a hearing was held before the undersigned referee in San Jose, California, on May 26, 1948. The record was thereafter reopened to allow introduction thereunto of additional documentary evidence received. The claimant was personally present at the hearing and participated therein, together with her duly appointed legal representative, Mr. Arthur L. Johnson. Mr. T. O. Kluge and Mr. R. G. Wells, being the general manager and personnel director, respectively, of the California Prune and Apricot Growers Association, were present and participated in the hearing, together with Mr. Gerald H. Hagar, of the law firm of Hagar, Crosby & Crosby, attorneys for the Association, was also present and participated in the hearing.

The claimant contends that the service rendered by her husband for the California Prune and Apricot Growers Association were in covered employment and that all of his earnings from such employment should be credited by the Social Security Administration as wages as a result whereof the wage earner would have at the time of his death a fully insured status.

The benefits applied for by the claimant on behalf of her children are provided for in section 202(c) of the Social Security Act, as amended, and the benefits [5] applied for by the claimant on her own behalf are provided for in section 202(e). The claimant, on her own behalf and on behalf of her children, has satisfied all of the conditions of entitlement under those sections, with the exception of those conditions which require that the wage earner have been, at the time of his death, a fully or currently insured individual.

"Fully insured individual" is defined in section 209(g) and for the purposes of this case, based upon the wage earner's death on July 8, 1945, to constitute him a fully insured individual he would have required seventeen calendar quarters of coverage.

"Currently insured individual" is defined in section 209(h) and under the provisions of that section the wage earner, in order to be so insured, required six quarters of coverage of the twelve calendar quarters elapsing immediately preceding the calendar quarter in which the wage earner died.

The record in this case discloses that the wage earner performed services for the California Prune and Apricot Growers Association, commencing in the latter part of 1939, to and including approximately November 4, 1944. Over that period he performed services in four separate functions of the operations of the Association, which functions were as follows: (1) Processing and packing; (2) Re-

ceiving and grading; (3) Shipping; and (4) Maintenance. All of the wages received for such services since and including the year 1940 are subject to the determination herein to be made, excepting that under the provisions of section 205(c)(2) the statute of limitations has operated against the wage reportings and credits on the wage record of this wage earner for the year 1940 and cannot be altered, deleted or changed as a result of this decision. As regards all employment for this Association prior to 1940, the services were admittedly rendered in employment under the Social Security Act and its interpretation then in effect. Since 1940, the wage earner, in numerous pay periods, performed maintenance services which constituted more than one-half of all services rendered for the Association during such pay period and therefore his entire earnings for such pay period were credited as wages under the provisions of 209(c). After crediting the wage earner with all earnings prior to 1939 and during 1940 and all pay periods subsequent to 1940, during which periods his services for the Association in maintenance work constituted more than fifty per cent of the services rendered during such pay period, the referee finds, as the record shows, that the wage earner had fourteen calendar quarters of coverage towards the seventeen quarters of coverage required for a fully insured status and had two quarters of coverage towards a currently insured status.

For the purposes of this case we will concern

ourselves only with services performed by the wage earner in the functions of: (1) Processing and packing; (2) Receiving and grading; and (3) Shipping. The Bureau has held that such services were in agricultural labor and as such were excluded from employment, and the remuneration received by the wage earner therefor cannot be credited as wages. That presents the very issue to be determined at this time.

The California Prune and Apricot Growers Association, the employer in question here, is a cooperative association made up of approximately 5,000 growers whose growing [6] activities are in California and in the main confined to the area between Red Bluff on the north and the Tehachapi Mountains in the south. This is what is generally known as Central California, in which large area are situated the San Joaquin and Sacramento Valley. The 5,000 some odd growers referred to are not directly members of the California Prune and Apricot Growers Association, hereinafter referred to as "Association," but are members of twenty-eight local associations, each independent from the other, which local associations, in turn, are members of the Association. Each one of these locals has its own organization and elects representatives of itself to become members of the Association. None of these local associations own any physical properties. All the physical properties utilized for packing and distribution of produce are owned by the Association. The Association has eighteen plants situated

at various points over its service area in the state but San Jose is the principal place of business of the Association, wherein are situated eight plants. The Association's head offices are also situated in San Jose.

The Association handles prunes, peaches, apricots, apricot pits and nectarines, in approximately that order of importance or volume. All of the fruits handled by it are dried fruits. Of the total volume of business handled by the Association, approximately eighty-five per cent is in prunes. For our purposes, it appears that it will not be necessary to consider this Association other than in its prune production, since that is its principal business and will substantially reflect its operations in the other products enumerated.

At appears that the region in question, to wit, the Central California region, produces and distributes approximately 90% of all prunes produced and distributed in the United States and of the total prune production the Association handles approximately one-third or more. The remaining two-thirds of prunes produced and distributed are handled by commercial packers, consisting of from twenty to thirty-five concerns. The Association handles almost twice as much in volume in the prune business as its closest competitor.

The grower brings his prunes to one of the packing houses operated by the Association and upon delivery and inspection thereof by the Association is given a receipt for such delivery. At the time the receipt is given, the fruit is received and the matter

is reported to the accounting office of the Association, and the grower is paid an "advance payment," which is 65% of the field price which prunes are then bringing. Thereafter and until the seasonal pack is totally sold, progress, accountings and payments are made, and, at the time the entire seasonal pack is sold, the grower is given a final accounting and payment for prunes delivered to the Association in that season. The prunes, upon receipt are co-mingled with all other prunes in the packing house and are shipped as orders are received. Consequently, the prunes may remain in the packing house anywhere from two months to eighteen months, depending on the size of the pack and the condition of the prune market. So, it appears that in some instances a grower may wait as long as eighteen months for his final payment and accounting. After the prunes are delivered by the grower to the Association, he loses all control over them physically and under the contract he has with the local association, of which he is a member, he parts with sufficient title in those prunes to the Association to allow the Association to handle those prunes as outright owner. In this regard, the Association is empowered to borrow money, giving the prune pack in its possession as security therefor and do all of the things necessary or proper that any person, who is the outright owner of produce, might do with such prunes. However, it appears from the manner in which the title is handled that the grower continues carrying economic risk, as it cannot be determined [7] what he will receive for his crop until

the entire seasonal crop of all member growers is sold in full. In this regard, the transfer of the prunes from the grower to the Association differs from the transfer of produce from a grower to a commercial packer who purchases the produce outright at a market price, or any other price agreed upon between the grower and the commercial packer.

As stated previously, with the exception of apricot pits, this Association deals only in dried fruits. The fruits are harvested on the farms or orchards of the grower and after harvesting, are dehydrated for the grower, at his own expense. It appears from the records available that 85% of the fruit brought to this Association has been dehydrated for the grower by commercial dehydrating plants and the cost thereof has been paid to such dehydrators by the grower. No dehydration process whatsoever is performed by the Association. When the produce is brought by the grower in dehydrated form to the Association and after it has been weighed, it is first tested to determine its perishability. If the produce does not meet the standards of the Association in this regard, it is rejected by the Association. Upon acceptance by the Association it is placed in bins after it has been graded and remains in those bins until it is ready to be packed. Before packing the produce is sterilized and with the exception of the actual packing operation that is the only process performed on the fruit by the Association. None of the fruit is packaged until an order therefor is received by the Association. Generally, the Association

engages in two types of packing, to wit: (1) "Carton" pack, and (2) "bulk" pack. These two types or categories are in turn divided into numerous categories consisting of the types and sizes of cartons, boxes, barrels, etc., employed. The "carton" pack referred to is the pack generally prepared for the consuming trade. About 40% of the total prunes packaged are "carton" packed and the balance is "bulk" packed. Of the "carton" pack, approximately 40% of the sales made by the Association are directly to large retail organizations, such as chain stores, super markets, etc., which organization, in turn, sells directly to the consuming public. The balance of the "carton" pack is sold to wholesalers. Approximately 75% of the "bulk" pack is distributed through wholesalers.

From the evidence in this record it appears that this Association performs its functions and handles its produce substantially identical to the manner and method utilized by Rosenberg Brothers, a commercial packer. Rosenberg Brothers was the employer involved in the case of Miller vs. Burger, 161 Fed. 2d. 992, in which case it was held that a processor of dried fruit was not engaged in agricultural labor.

"Agricultural labor" is defined in section 209 (1) which reads, in part, as follows:

"The term 'agricultural labor' includes all service performed— . . . . .

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for

transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning [8] or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. . . ."

The Social Security Administration has determined that the principals enunciated in the Burger case, (supra), do not establish a basis for a finding that an individual rendering processing services for a cooperative association is engaged in "employment" within the contemplation of the Social Security Act, as amended. The position taken by the Administration is to the effect that services on and after January 1, 1940, in the handling, packing, packaging, processing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of dried fruit, as well as fresh fruit and fresh vegetables, which such handling is for the account of the producer (i.e., where the processor, whether a cooperative or a commercial handler, operates on a fee basis and does not buy the producer's product outright), are excepted services under section 209(1)(4) of the Social Security Act, as amended.

The referee, accordingly, finds that the services rendered by the wage earner since January 1, 1940, as a dried fruit processor, excluding services rendered as a maintenance man, for the California Prune and Apricot Growers Association, a cooperative association, are excepted as "agricultural labor" under section 209(1)(4) of the Social Security Act, as amended.

There is evidence in this record that the claimant and also her daughters have, at times, since the date of the death of the wage earner, rendered services in covered employment which would subject their respective benefits to deductions for some months under the provisions of section 203(d)(1). However, since it has been found that no benefits were payable, the referee makes no specific finding as to any particular months in which the benefits of any of the beneficiaries are subject to deductions under the provisions of section 203(d)(1).

Is it therefore the decision of this referee that claimant, on her own behalf, and on behalf of her two children, is not entitled to the widow's current insurance benefits and the child's insurance benefits for which she has applied.

/s/ MARTIN TIEBURG,
Referee.

Date: June 8, 1949. [9]

Arthur L. Johnson
Attorney at Law
202 Porter Bldg.,
2nd and Santa Clara Sts.
San Jose 20, California

May 20, 1948.

Hon. Martin Tieburg,
Referee, Social Security Administration,
443 Federal Office Bldg.,
San Francisco 2, California.

Dear Mr. Tieburg:

In ref: Claim of Mary R. Baiocchi,
No. 552-14-0672.

Mindful of your regulations requiring ten days' notice for hearings I am writing this to waive this requirement on behalf of the claimant, who will be prepared to proceed with the hearing at 1:30 p.m. on next Wednesday, May 26, 1948, at the Social Security Administration offices in the Commercial Bldg., San Jose, California, in accordance with arrangements made by long distance telephone.

Thanking you for your cooperation in this matter, I remain,

Very sincerely yours,
/s/ ARTHUR L. JOHNSON.

ALJ:W

C.C. to: 1. Mr. T. O. Kluge,
General Manager,
California Prune & Apricot
Growers Association,
Market & San Antonio Streets,
San Jose 5, California.

2. Mrs. Mary R. Baiocchi,
221 Cleaves Avenue,
San Jose, California.

3. Mr. John J. Cassidy,
Manager, Social Security Administration,
Commercial Bldg.,
San Jose, California. [9-A]

Federal Security Agency
Social Security Administration

Office of Appeals Council

Request for Hearing

In the case of Mary R. Baiocchi, Claimant, Almando Baiocchi, Wage earner, 552-14-0672, Social Security Account number.

Claim for: Widow's Current Insurance Benefits and Minor Children's Benefits.

To the Social Security Administration:

I disagree with the determination made on the above claim, and therefore request a hearing be-

fore a referee of the Social Security Administration. If convenient, I would like to have this hearing held on or about May 18, 1948, at or near San Jose, California.

Remarks: I claim that my deceased husband's work was not agricultural in any sense, that it comes squarely within the decisions of the U. S. District Courts in the cases of Bettencourt vs. Social Security Board, 66 Fed. Supp. 629, and Burger vs. Social Security Board, 66 Fed. Supp. 619, and of the U. S. Circuit Court of Appeals in the cases of Miller vs. Bettencourt, 161 F. 2d 995, and Miller vs. Burger, 161 F. 2d 992 (June 5, 1947) as work done at both the "growers' market" and at a "terminal market for distribution for consumption" and was clearly commercial under these decisions and under the decisions of the Appeals Council of the Social Security Administration in the cases of Edgar T. Penn (554-03-8307) and Marguerite K. Grimley (554-03-7972), decided July 15, 1947, and July 16, 1947, respectively.

I claim further that, except for any portion that was under $45 during any quarter, the work clearly was brought under coverage of the Act by the express terms of Sect. 209 (b)(10)(A)(i), and am bringing this as a test case for all the employees of the California Prune & Apricot Growers Association and the Sun-Maid Raisin Growers of California, the only two dried fruit cooperatives in America, both of which fall within the categories

already ruled covered by the courts and the Social Security Administration.

Date: May 4, 1948.

/s/ MARY R. BAIOCCHI,
Claimant,
221 Cleaves Ave.,
San Jose, Calif.

/s/ ARTHUR L. JOHNSON,
202 Porter Bldg.,
San Jose, Calif.
Attorney for Applicant and the other wage earners involved, and their dependents.

Acknowledgment of Request for Hearing

Your request for a hearing (of which the above is a copy) was filed on May 7th, 1948, at Room 1002 Commercial Bldg., 28 No. 1st St., San Jose, California. The referee will notify you of the time and place of the hearing at least 10 days prior to the date which will be set for the hearing.

For the Social Security Board,
By /s/ JOHN J. CASSIDY,
Manager,
San Jose, Calif.

To: Regional Referee.

[Stamped]: May 10, 1948. [9-B]

TRANSCRIPT OF HEARING

(Transcript of the hearing in the cases of Mary R. Baiocchi on her own behalf, and on behalf of Leola D. and Geraldine Baiocchi, for widow's current insurance benefits and child's insurance benefits, based upon the wage record of the deceased wage earner, Almando Baiocchi, social security account number 552-14-0672, whose claims were disallowed by the Bureau of Old-Age and Survivors Insurance of the Social Security Administration. Upon her request a hearing was held before Martin Tieburg, a referee of the Federal Security Agency, in San Jose, California, on May 26, 1948. The claimant was present and participated in the hearing. Representing the claimant was Mr. Arthur L. Johnson, and also testifying were Mr. Richard G. Wells, Personnel Director, California Prune and Apricot Growers Association; Mr. Gerald H. Hagar, Attorney, Hagar, Crosby & Crosby, Oakland, California, and Mr. T. O. Kluge, General Manager, California Prune and Apricot Growers Association.)

Opening Statement by the Referee

This is the hearing in the matter of Mary R. Baiocchi on her own behalf and on behalf of her two children, whose names are Leola D. Baiocchi and Geraldine Baiocchi, who filed for widow's insurance benefits and child's insurance benefits, being

appeals cases numbers 12-1093, 12-1094, and 12-1095.

Mrs. Baiocchi filed an application for the benefits referred to with the Bureau of Old-Age and Survivors Insurance of the Social Security Administration. The Bureau considered the application and came to the determination and did make the determination that the wage earner was not a fully insured individual. This determination was made on the basis that the earnings that he had received from the California Prune and Apricot Growers Association were in agricultural labor and, as such, were not wages, and without those earnings [10] on his wage record the wage earner did not have the number of quarters required to constitute him a fully insured individual.

Mrs. Baiocchi, on her own behalf, and on behalf of her two children, disagreed with the determination made by the Bureau and filed a request for a hearing before a referee of the Social Security Administration. Such a hearing is being held in San Jose, California, on May 26, 1948, before Martin Tieburg, referee for Region XII. Present at this hearing is Mrs. Baiocchi on her own behalf and on behalf of her children. Representing Mrs. Baiocchi on her own behalf and on behalf of her children is Mr. Arthur L. Johnson who has been duly authorized to appear as her attorney. Also present to testify is a witness from the California Prune and Apricot Growers Association, Mr. Richard G. Wells, personnel director of that associa-

tion. He is present, together with the attorney for the association—is your name Mr. Hagar?

Mr. Hagar: Yes.

The Referee: Mr. Gerald H. Hagar of Oakland, California. All these parties will testify and participate in this hearing when called upon to do so. In addition to those parties present is Mr. T. O. Kluge, general manager of the association, San Jose, California, and if called upon to do so will appear and participate in this hearing either at this time or at a continued or adjourned hearing.

Now, Mrs. Baiocchi and Mr. Johnson, I am going to read to you the remarks that are included upon the request for hearing which was executed by Mrs. Baiocchi on May 4, 1948, and ask you if that clearly and distinctly sets forth the contention that you make at this time on this appeal. The following is a reading of the request for hearing. (Reads.)

"I claim that my deceased husband's work was not agricultural in any sense, that it comes squarely within the decisions of the U. S. District Courts in the cases of Bettencourt vs. Social Security Board, 66 Fed. Supp. 629, and Burger vs. Social Security Board, 66 Fed. Supp. 619, and of the U. S. Circuit Court of Appeals in the cases of Miller vs. Bettencourt, 161 F. 2d 995, and Miller vs. Burger, 161 F. 2d 992 (June 5, 1947) as work done at both the 'growers' market' and at a 'terminal market for distribution for consumption' and was clearly commercial under these decisions and under the decisions of the Appeals Council of the Social Security

Administration in the cases of Edgar T. Penn (554-03-8307) and Marguerite K. Grimley (554-03-7972), decided July 15, 1947, and July 16, 1947, respectively.

"I claim further that, except for any portion that was under $45 during any quarter, the work clearly was brought under coverage of the Act by the express terms of Sect. 209 (b)(10)(A)(i), and am bringing this as a test case for all the employees of the California Prune & Apricot Growers Association and the Sun-Maid Raisin Growers of California, the only two dried fruit cooperatives in America, both of which fall within the categories already ruled covered by the courts and the Social Security Administration."

Mrs. Baiocchi, this is the request for hearing which you have supplemented and that is the contention you make; is that correct?

Mrs. Baiocchi: That's right.

The Referee: We will proceed at this time with the introduction of the various exhibits in this matter from the claim file.

Mr. Johnson: I wonder if I could interpose to state there that I represent the various unions involved in this and am appearing on behalf of all of these people who are interested in this problem. I would like the record to so show that I am appearing for the entire group of both this association and the Sun-Maid Raisin Growers of California, representing both A F of L and CIO unions, and independent employees and their dependents.

The Referee: For the purposes of the record, could you state for the record the exact name and title of these unions that are involved in this case.

Mr. Johnson: Well, here in San Jose it is the Warehouse Union, the CIO group; in Fresno it is—— [12]

The Referee: What local?

Mr. Johnson: Local 6. In Fresno it is the Dried Fruit Union, A F of L group; in Oakland it is the A F of L group; in Napa, the A F of L group; in Healdsburg it is the CIO group, a branch of the same Local 6. They are all looking to me to take this through as a test case because their workers that are employed by these two associations, co-operatives both of them, and the only two dried fruit coops in America, as I understand it, and they are looking to me to handle this matter.

The Referee: We will now proceed with the introduction of the exhibits in this matter.

Exhibit A. Application of Widow, and Widow on Behalf of Child, for Survivors Insurance Benefits, Signed by Mary R. Baiocchi, Dated July 18, 1945. (Document Nos. 1-2.)

Exhibit B. Photostatic Copy of Wage Record of A. Baiocchi as Maintained by Social Security Administration. (Document unnumbered.)

Exhibit C. Request for Reconsideration, Dated November 8, 1947. (Document No. 16.)

Exhibit D. Copy of Wage Record of Almando Baiocchi for Services Rendered California Prune and Apricot Growers Association, from February

1, 1941, to and including November 4, 1944. (Document Nos. 22-26.)

Exhibit E. Copy of Letter to Mrs. Mary R. Baiocchi from Social Security Administration, Dated March 26, 1948. (Document No. 31.)

Exhibit F. Report of Contact Between Albert L. Benelisha, Acting Manager, San Jose, California, Field Office, and Thomas Miller, Secretary, California Prune and Apricot Growers Association, San Jose, California, Dated April 28, 1948. (Document No. 34.)

Exhibit G. Letter to Social Security Administration from T. O. Kluge, General Manager, California Prune and Apricot Growers Association, San Jose, California, Dated April 29, 1948. (Document No. 35.)

That constitutes all of the exhibits in this matter.

MRS. MARY R. BAIOCCHI

the claimant, was duly sworn and testified as follows: [13]

Examination

By the Referee:

Q. Your name is Mary R. Baiocchi?

A. That's right.

Q. And you are the widow of Almando Baiocchi?

A. That's right.

Q. And you have two children whose names have been given, and they are the children of yourself and Mr. Baiocchi? A. Yes.

Q. And they are both under 18 years of age?

(Testimony of Mrs. Mary R. Baiocchi.)

A. One is over 18 now but at the time of the application they were both under 18. Leola is over 18 now.

Q. What is your age? A. 45.

Q. So that at the present time you are filing application for what is known as a widow's current insurance benefit? A. Yes.

Q. At the time of your husband's death you were living together with him as husband and wife?

A. Yes.

Q. At the same address? A. Yes.

Q. And that was in San Jose? A. Yes.

Q. Is your present correct address 221 Cleaves Avenue, San Jose, California? A. Yes. [14]

Q. You know that your husband was at one time or another employed by the California Prune and Apricot Growers Association? A. Yes.

Q. Do you know anything about his employment other than the fact that he was employed there?

A. Well, I know he did all kinds of work there.

Q. But you don't know anything about the association itself, how it is managed, or anything about it? That is something that you would be satisfied to rely upon the testimony adduced from the other witnesses? A. I think so.

Q. And that is agreeable, is it not, Mr. Johnson?

Mr. Johnson: Yes, it is, Mr. Referee.

Q. Do you have any facts that you think will be pertinent to the matters which will come before us that you want to testify to other than the facts

(Testimony of Mrs. Mary R. Baiocchi.)

that will be testified to by the officials and employees of the company who are familiar with its structure and its operations?

A. Well, the thing is that I don't see why they could call that agricultural where that is in the city limits, almost in the middle of the city limits.

Q. Well, that is something, of course, that is quite technical, and that is a fact to be considered and will be considered.

Mr. Johnson, do you know of anything Mrs. Baiocchi should testify to?

Mr. Johnson: Well, I have here a photograph of Plant No. 11 of the California Prune and Apricot Growers Association.

Q. Don't you think it is best that we reserve that until we take the testimony of the witnesses who will testify as to its operation. They will be [15] in a position to testify as to its location and everything about it.

Mr. Johnson: Yes.

I will ask if her deceased husband worked at plant No. 11 on Cinnabar Street?

Q. That is in San Jose?

Mr. Johnson: Yes.

Did he ever work at any other plant of the association?

A. No. He worked at Roberts but that is not in the association.

Q. Now in connection with the disposition of these matters, and while you are a witness before

(Testimony of Mrs. Mary R. Baiocchi.)

me it is proper that I ask you if you have any finding of fact that you propose I would make or, rather than that, is it satisfactory to you that that matter remain for the close of the hearing and that such proposal be made on your behalf by your attorney? A. I think so.

Mr. Johnson: That is satisfactory.

Could I ask if you have in your file, Mr. Referee, a breakdown of the earnings of Leola Baiocchi and Geraldine Baiocchi, and also those of Mrs. Mary Baiocchi subsequent to the death of the wage earner in this case. I think it would be material because in certain months more than $15.00 was earned by some of these claimants in covered employment.

Q. Well, Mr. Johnson, do you have it in the form of a list, or could you prepare a list from the information furnished by your client that you could submit for the purpose of the record?

Mr. Johnson: I think there was one attached to the request for reconsideration. I assumed that would be made a part of the record so I didn't prepare an additional list. [16]

Q. I have that in the claim file. It does not give the employments and any other employment covered or noncovered which the parties may have engaged in, which is in itself a question. I might suggest that if you can prepare in the future a listing of all the various places they worked, what times they worked and what their earnings were—I have that of Mary Baiocchi from the Richmond-Chase Company.

(Testimony of Mrs. Mary R. Baiocchi.)

I might ask you, Mrs. Baiocchi, have you ever since your husband's death worked for any other concern other than the Richmond-Chase Company in San Jose, California?

A. Yes, I worked at Clapp's Baby Foods.

Q. Is that a cannery?

A. Cannery for baby food in Santa Clara.

Q. Do you have a listing of her earnings and the times they were received or could you obtain those?

Mr. Johnson: I don't have them except for the Richmond-Chase Company, but I imagine we could obtain those. That is during this year?

Q. Since the death of her husband.

Mr. Johnson: Your testimony is that your work with these two concerns that you last mentioned has all been in the year 1948; is that correct?

A. Well, the latter part of '47 and '48 now.

Mr. Johnson: How much of it was done in the latter part of '47? A. Just about 2 weeks.

Mr. Johnson: What month?

A. December.

Mr. Johnson: How much did you earn in those 2 weeks in December?

A. They were very small checks. [17]

Mr. Johnson: Over $15.00?

A. Yes.

Q. What concern was that for?

A. Clapp's Baby Food.

Mr. Johnson: Have you been working in covered

(Testimony of Mrs. Mary R. Baiocchi.)

employment and earning over $15.00 per month ever since the first of this year?

A. Just about. I made over $15.00.

Mr. Johnson: So that this record then, Mr. Referee, would be complete as far as stating the facts on the basis of which a ruling might be made in that regard, as far as Mrs. Mary Baiocchi is concerned.

Q. What kind of work did you do for the Richmond-Chase Company?

A. Machine operator or cutter.

Q. What did they produce?

A. Canning fruit.

Q. It was a canning operation? A. Uhuh.

Q. You didn't engage in any packing operations of fresh fruits and vegetables? A. No.

Q. Then is it stipulated, that is, are you in a position to stipulate these earnings from Richmond-Chase were in covered employment?

Mr. Johnson: Correct.

Q. Now, insofar as the two children are concerned, the record here discloses that Leola Baiocchi was paid on July 18, 1945, $70.47. What period did that cover? A. I think that was in '45. [18]

Q. I think it would require—possibly your recollection may not serve you that far back, but if you can investigate that a bit further and ascertain in what months she worked and what sums she received for the months rather than the pay dates, I would like to have that, Mr. Johnson.

(Testimony of Mrs. Mary R. Baiocchi.)

A. She was going to school at the time. She only worked in the summer time, July, August and September. It would be about the middle of September, that is about all.

Q. So that she performed no services in June of 1945 at all that you know of?

A. She was going to school at the time.

Q. Was that for the U. S. Produce Company?

A. That's right.

Q. What kind of a business is it?

A. Cannery. Fresh fruit.

Q. They can fresh fruit? A. Uhuh.

Q. There is no other fresh fruit packing other than canning operations?

A. That is all; I think so.

Q. Are you familiar with that concern, Mr. Johnson?

Mr. Johnson: That is in covered employment. It is so stipulated.

Q. Now in 1946 she again worked the same 3-months' period and received the sums shown on document 15 in this claim file. That was for the same concern? A. That's right.

Q. Now, as regards Geraldine Baiocchi, there are earnings shown here in August, 1947, and September, 1947, for the Hershel Company. What business are [19] they in?

A. In fresh fruit canning.

Q. You understand that to be covered?

A. Yes.

(Testimony of Mrs. Mary R. Baiocchi.)

Mr. Johnson: We so stipulate on that.

Q. Did they work at any other times since 1945 for any other concerns? A. No.

Q. In covered or noncovered employment, I mean. A. Not at all.

Q. At the present time is the one under 18 working? A. No, she goes to high school.

Q. Then it is not anticipated that she will again work until this summer when she is out of high school? She hasn't worked during Christmas vacations? A. No.

Mr. Johnson: Could I ask about the older one now over 18? Did she continue in school until she became 18?

A. No, she quit school. She got married.

Mr. Johnson: When?

A. In October.

Mr. Johnson: What year?

A. '47.

Mr. Johnson: In October of '47, was she then over 18?

A. Yes, she became 18 on March 20.

Q. of 1947? [20] A. Yes.

Q. She married thereafter?

A. Yes, she married in October of '47.

Mr. Johnson: So then she continued in school until she was 18?

A. No, I think she quit school to go to the cannery. She didn't go back to school.

Q. That was in the summer time?

(Testimony of Mrs. Mary R. Baiocchi.)

A. She didn't go back to school in September.

Q. She was over 18, wasn't she, in September?

A. Yes, that is right.

Mr. Johnson: Does that clear up that angle to your satisfaction so we don't have to submit anything further on that, Mr. Referee?

Q. (Remarks off the record.)

At this point in the hearing we will take into the record and mark as Exhibit H two documents in the claim file not heretofore introduced, which are documents 14 and 15, being a listing of earnings of the claimant and her two children for the periods to which she testified near the close of her testimony.

Introduced as Exhibit I is a copy of a letter from the California Prune and Apricot Growers Association, addressed to the Social Security Administration, dated October 22, 1947.

I have in my hand a letter from the California Prune and Apricot Growers Association, addressed to Mr. Arthur L. Johnson, dated May 25, 1948, relative to the number of employees employed by the association which will be taken into the record and admitted as Exhibit J.

At this time I have in my hand, submitted by Mr. Johnson and examined and discussed with Mr. Hagar, the attorney for the association, a prune marketing agreement which is the form of agreement entered into between the actual grower and a local cooperative association; is that correct?

Mr. Hagar: Yes, sir.

Q. This will be taken into the record and marked Exhibit K.

I also have a form of contract of the California Prune and Apricot Growers Association entitled "Local-Central Contract," which is introduced into the record and marked Exhibit L.

MR. RICHARD G. WELLS

was duly sworn and testified as follows:

Examination

By the Referee:

Q. Would you kindly state your full name and residence address for the purpose of the record, Mr. Wells?

A. Richard G. Wells, 435 South 14th Street, San Jose, California.

Q. You, Mr. Wells, are connected in some capacity with the California Prune and Apricot Growers Association; is that correct? A. Yes.

Q. Are you the personnel director for that association? A. Yes.

Q. And your office is in San Jose, California?

A. Yes.

Q. What is the address of that office?

A. San Antonio and Market Streets.

Q. How long have you been connected with this association, and, for the purposes of brevity and convenience, we will refer to it as "association" instead of using the entire name. [22]

A. 3 years and 8 months.

(Testimony of Richard G. Wells.)

Q. You are familiar with the operations of this company and its State-wide operations?

A. Yes.

Q. Does your work take you to the various points of the State at which the association operations are carried on? A. Yes.

Q. Are you familiar with their methods of acquisition of fruit and their handling and distribution? A. Reasonably so, yes.

Q. What exactly are your duties in the association? A. Well——

Q. I mean just a general description.

A. Labor negotiations, contract agreements, grievances with unions, personnel problems and relationships, plant job evaluation, scope, descriptions, and editorship of the association employee paper, conduct training programs for supervisory personnel.

Q. What do you have to do in your work which is related to the contract or other relationship between the association and its grower members, either through the local associations or with these growers individually.

A. During the past 13 months the association has been conducting an educational program with ten other California marketing cooperatives, which is known as a farm coop educational program. In that program we have visited various geographical areas in the State of California conducting sessions known as "Information Please" programs to Future Farmers of America chapters in which [23]

(Testimony of Richard G. Wells.)

the local associations have participated. By "local associations" I am referring to CP and AGA locals. We also have grower members who work in our plants as regular general laborers, and there are union contract stipulations in regard to the employment of said growers.

Q. Have you, in connection with this survey—let's call it a survey or an education program—made a study of the relationships between the association and the individual grower?

A. Yes, I have. It has been a requirement to answer some of the questions posed at the group by various Future Farmer students on the second school level.

Q. Where did you get your information to answer those questions relating to the relationship between the association and grower?

A. I had to review the by-laws and acts of incorporation of the association and various and sundry literature prepared for future prospective growers interested in becoming association members.

Q. Did you also at various times consult officer members of the association, such as Mr. Kluge possibly, and Mr. Miller?

A. I had to consult with Mr. T. Kluge, general manager; Mr. W. S. Rice, field manager, and Mr. J. D. Canton, superintendent of production, and many of our plant superintendents who are also field men associated with the Field Department.

Q. How many plants in which produce is ac-

(Testimony of Richard G. Wells.)

tually handled does the association operate in the State of California?

A. The association operates 18 active receiving, storage, grading and processing plants, one general shop, and the main office located in San Jose. [24]

Q. What is the general shop?

A. The general shop is a unit maintained by the association, staffed by journeyman mechanics for the research or building and repairing and general maintenance of the association equipment.

Q. None of the produce that is handled by the association is handled through that shop for commercial purposes? It is used only for research and experiment; is that correct?

A. That is correct.

Q. And of course none of the produce is actually handled other than the sample form in the offices; is that correct?

A. That would be correct.

Q. Do you have a selling organization in the association also?

A. The association maintains a sales staff.

Q. Separate and distinct from its cooperative features? By that question I mean is the sales staff separate from the staff that obtains the fruit and handles the fruit?

A. The association has departmental groups, a field department, and a manufacturing department, a general accounting department, and a sales department so it has equal standing in various similar organizations to the others I named.

(Testimony of Richard G. Wells.)

Q. Where does it maintain sales offices, if you know, the association?

A. May I at this time state if there is any correction or addition Mr. Hagar would like to add to my statements, is it permissible?

(Remarks off the record.)

Continue relatively. [25]

A. Traditionally the commercial food business has been handled by food growers which are located throughout the world.

Q. Does the association itself operate a sales office at any place other than its head office?

A. To the best of my knowledge there are two men on the staff paid directly by the association as a type of liaison sales promotion in the eastern part of the United States.

Q. They are merely promotional in that they call on prospective consumer organizations possibly and advertise the merchandise rather than are concerned strictly to taking orders for immediate shipments or direct shipments?

A. Well, from statements rendered I would say that if an order was offered to them they would get it down the correct channels.

Q. But they are not paid?

A. I think Mr. Hagar could answer that better than I.

Q. Mr. Hagar has a correction to make, being better versed in this, and his statements will be accepted in the record at this time in response to that question.

(Testimony of Richard G. Wells.)

Mr. Hagar: The association sells through independent brokers; it does not maintain any separate sales organization which sells directly to a sales grocery store or small consumer. It does sell directly to large chains, such as Safeway, but other than that exception or those exceptions it operates exclusively through independent food brokers.

Q. And I assume, Mr. Wells, from your knowledge you can state that those brokers are situated in various parts of the United States; is that correct? A. Yes, and the world. [26]

Q. And the world. Now it appears in the record in this case, and so that you know what I am directing my question at I will read that portion of the record to you. This appears in Exhibit F, and I will read a part of a paragraph thereof:

"Upon receiving a purchase order from such organizations as Safeway Stores, A & P Stores, Red & White Stores, etc., or from brokers, they process and pack the dried fruit in containers as per order * * *"

Do you know what percentage of the produce that is handled by the association is sold directly to these large concerns named and others who may not be named? The names are Safeway, A and P, Red and White Stores, and that may also include Hagstrom's, Lucky Stores, and others I might name.

A. I think I would be at liberty to make the general statement of between 40 to 45 per cent.

Q. That sold direct retail?

(Testimony of Richard G. Wells.)

A. Carton packed and sold directly to these large super markets and chains, as mentioned.

Q. And the other 55 per cent or so, I assume—I am not limiting you to 55 per cent, but it might be 60 per cent is sold through brokers? The carton pack; is that right?

A. Yes, we are referring to carton pack.

Q. Now, in addition to that, I assume there is what might be called bulk pack as compared to carton pack?

A. Yes, we prepare and handle a bulk pack.

Q. Well, for the purpose of the record, what kind of pack do you sell? You have indicated that you sell the carton pack. What other packs do you sell? [27]

A. Well, at the present time we are selling a carton pack in various sizes, and we also have a pliafilm pack, and then there is what is termed a boat pack which has a visible pliafilm or cellophane top.

Q. Those are all——

A. They are specialty packs.

Q. That is one class. That wouldn't be considered a carton pack?

A. No, those are referred to as specialty packs. The other is strictly a carton.

Q. I see. Is there any other type of packs, such as in large sacks or large cases?

A. Well, there are two general bulk packs. That is in fibre and shook, fibre being cardboard and shook being wood.

(Testimony of Richard G. Wells.)

Q. Does that substantially represent every manner in which the main portion of the produce is packed at the time of the shipment?

A. I would say that——

Mr. Hagar: If I could interrupt I would like to say that I am sure Mr. Kluge could give you specific details on anything with regard to the manufacturing.

Q. I see.

(Recess.)

Let the record show that Mr. Wells has been excused from the stand and Mr. T. O. Kluge, general manager of the association, is now present and he will take the witness stand and testify.

MR. T. O. KLUGE

was duly sworn and testified as follows:

Examination

By the Referee: [28]

Q. Your name is T. O. Kluge, K-l-u-g-e, is that correct? A. That is correct.

Q. You are the general manager of the California Prune and Apricot Growers Association?

A. Yes, sir.

Q. Would you kindly state your residence address, Mr. Kluge?

A. 1910 University Way, San Jose, California.

Q. And your office is at the head office of the association? A. That is correct.

Q. What is that address?

(Testimony of T. O. Kluge.)

A. Market and San Antonio Streets, San Jose, California.

Q. How long, Mr. Kluge, have you been connected with this association in any capacities?

A. Since 1928.

Q. How long have you been general manager?

A. About 2½ years.

Q. Before that 2½ years, what was your capacity?

A. Assistant general manager.

Q. How long were you assistant general manager?

A. From 1928 until the time I became general manager.

Q. (Remarks off the record.)

Mr. Kluge, can you give me a rough estimate or a rather authoritative estimate of what percentage of, for instance, prunes. Let's take the total percentages that are produced in California and put through regular distribution channels. What percentage of that total is handled by the association?

A. Approximately one-third; it will vary lower and higher than that percentage.

Q. It would be safe to say that over a period of several years the average will approximate one-third of total prune production?

A. I would say that is approximately correct.

Q. And the other two-thirds are handled by what types of concerns?

A. Well, what we term as commercial packers.

Q. Do you know the practice in California by

(Testimony of T. O. Kluge.)

these commercial handlers as to what portion of that two-thirds is packed by them as a result of outright purchases by them from the grower as compared to packs by them for a fee for the account of the grower? Is that question clear?

A. If I understand the question correctly you are asking what proportion the commercial handlers buy outright and what proportion they pack for a fee.

Q. In tonnage.

A. I would say, to the best of my knowledge, that over 95 per cent of the tonnage that is handled by commercial packers is outright purchases.

Q. And though that will vary from year to year or season to season that would be a pretty fair average for the period involved here, which is from approximately 1941 to the present date?

A. That is correct. Prior to that time there were contracts entered into with the Federal Surplus Commodity Corporation on a fee basis, but I think that my statement is substantially correct from 1941 to the present date.

Q. Is there any way that you could estimate how many other individual sizeable concerns there are that your organization competes with? Are there just a few or are there very many? [30]

A. I would say that the range—it will vary from season to season—but it is a minimum of 20 and probably a maximum of 35. You are speaking, I presume, of California?

(Testimony of T. O. Kluge.)

Q. California. A. That is right.

Q. Your concern does not handle the produce of any other State for distribution?

A. That is correct.

Q. Is the produce handled by you raised in every part of the State, or is your activity confined to a section of the State of California?

A. At the present time we are working or handling produce from as far north as Red Bluff to as far south as the Tehachapi, occasionally a smaller tonnage south of the Tehachapi.

Q. Now of that area alone, confining your answer to that area as far north as Red Bluff and as far south as the Tehachapi Mountains, would your previous answer as regards the ratio of the tonnage handled by you as compared to the tonnage handled by other commercial handlers be substantially the same?

A. I wouldn't say so on one particular commodity, and that is dried apricots. We receive a very small tonnage of dried apricots south of the Tehachapi Mountains.

Q. I see. Let me put the question more pointed. Confining ourselves to prunes alone, would you say that of all the prunes produced in, well, California, that the central area between Red Bluff and Tehachapi, that your association handles, packs and distributes about one-third of the production? [31]

A. That is approximately correct.

Q. Are prunes the largest commodity handled by your association? A. Yes, they are.

(Testimony of T. O. Kluge.)

Q. What is the next largest in volume and importance?

A. That will vary from season to season. Some years it is apricots, and other years it is peaches.

Q. And then those two commodities will be either second or third?

A. That is correct.

Q. What would be the fourth in importance?

A. In recent seasons I would say that nectarines would be fourth. Pardon me, there is one other commodity that will exceed nectarines, and that commodity is apricot pits.

Q. That is a by-product of the apricot?

A. That is a by-product.

Q. If you know, what is the percentage of prune pack produced in California to that produced in the rest of the United States? I might ask you this. Is it not a fact that California is one of the principal States in prune production?

A. It is the principal State.

Q. I see. Well, then, that being the fact, can you estimate what the relative importance is of the California food production to the production in the entire United States?

A. You are talking of prunes now?

Q. Prunes.

A. I would say that, giving the last 2 years as an example, California has produced over 200,000 tons of prunes, whereas the Northwest has produced less than 10,000 tons of dried prunes. [32]

(Testimony of T. O. Kluge.)

Q. Is there other production in the Middle West?

A. There is not, to my knowledge.

Q. So that we are now considering one commodity which is more or less local for our purposes?

A. Yeah, and to the best of my knowledge the production of prunes in the Northwest last year was less than 10,000 tons, whereas the California production was in excess of 200,000 tons.

Q. Now confining ourselves to the Pacific Coast production, or, let's just confine ourselves to California production in this region that you principally serve, from Red Bluff to Tehachapi, what is the ratio between the pack of dried prunes and dried peaches or apricots, whichever might be second in any period?

Mr. Hagar: Could I interject at this point? Are you talking about tonnage or dollars?

Q. Let's confine ourselves to tonnage so we will have a single standard to go by and there will be no confusion.

A. If I understand the question correctly you want to know the production of dried prunes in the area which I mentioned as compared to dried peaches, for example; is that correct?

Q. Yes, if that were the second commodity.

A. I would say that the production of dried prunes, as I stated previously, was over 200,000 tons as compared to approximately 16,000 tons of dried peaches from the 1947 crop.

(Testimony of T. O. Kluge.)

Q. I see. Anticipating your answers to your smaller packs, is it reasonable to assume that about 75 per cent at least of the operations of your association is in prunes? [33]

A. Based on 1947 production the association's operations will be in excess of 85 per cent on prunes as compared to the other commodities.

Q. To all the others combined? A. Yes.

Q. So that a determination here which would be on the question of prune production, handling and distribution would fairly represent the greater part of your business?

A. That is correct.

Q. I understand what has been submitted heretofore that probably the bulk, if not all, of the production that goes through the association is brought to the association by grower members. Now as against that does the association purchase or acquire any produce from nonmembers for handling, packing or packaging and sale?

A. We do not.

Q. In other words, so to speak, every pound of produce that comes in there comes in through the regular channels under the contract provisions that you entered into with the various locals?

A. That is correct.

Q. Now, as I understand the structure of this organization, it is divided into numerous locals, which locals have the direct personal contact with the individual grower?

A. Yes. (Answer indicated by nod of head.)

(Testimony of T. O. Kluge.)

Q. How many of these locals are there?

A. I think there are 28 at the present time.

Q. Would that indicate that each one of these locals has a plant of its own, a structure in which operations are carried on? [34]

A. Not necessarily.

Q. Then a local might be just an association of people? A. That is correct.

Q. But your association does provide physical plants for the handling of this produce in various parts of the State?

A. That is correct.

Q. In how many different places do you have physical plants?

A. Approximately 16, is it, Dick?

Mr. Wells: 18.

A. Pardon me, 18.

Q. Do you have a principal point at which your packing is done? Could I ask this question. Is San Jose one of your principal points?

A. San Jose is one of the principal points.

Q. And in the San Jose area, which we will assume is confined to Santa Clara County, how many plants do you have? A. 8.

Q. Do each of these physical plants handle all the various types of fruit that the others do or are some of them confined to particular types of fruit or classes of fruit?

A. Some are confined solely to prunes; some will handle solely cut fruits. By that I mean apri-

(Testimony of T. O. Kluge.)

cots, peaches, nectarines. Others will handle the combined items.

Q. Mr. Kluge, you are no doubt familiar with the processes of the firm known as Rosenberg Brothers, are you not?

A. Generally speaking, yes.

Q. Is there any difference in the actual operations in the plants operated by you as compared to the operations carried on in any Rosenberg [35] plant that handles prunes?

A. There is practically no difference in the physical operations.

Q. What do you do with the prunes? I understand that when the prunes are brought to you by the grower, either by truck or otherwise, and put on your receiving platform, from there on your employees handle the truck, the weight initially, and give a receipt for it, and thereafter it goes through certain processes. Can you just generally outline the normal process and various steps that that fruit goes through?

A. The general procedure is that the fruit is weighed, inspected for moisture content after the product has been prepared by the grower member, and then it is graded for any defects, sorted out, and then the fruit is placed in storage for later packing. That period may extend from 2 weeks to 18 months.

Q. May I interrupt you at this point. Do you have any plan of procedure whereby the fruit is

(Testimony of T. O. Kluge.)

so stored that the oldest stored fruit is packed next, or is it just taken out haphazardly?

A. At the time that the fruit comes in it is intermingled. By that I means all growers' fruit that may be received that day may be intermingled with other growers' fruit. We do not segregate each grower's fruit after it has been received and graded and a grade sheet issued on the particular delivery. As far as the time element is concerned, it does not follow that the first fruit that comes in is the first fruit that goes out. The procedure as far as processing, packing and shipment goes depends entirely on the orders that are received and the supply of each particular size or quality that we have at any given date. [36]

Q. At the time it is stored, after it has been graded and inspected, as you stated, am I correct in assuming that the fruit, the prunes (let's confine our answers to prunes for our purposes) are just dumped into a bin together with the same grade and quality? A. That is correct.

Q. They stay there until they are actually taken out of that bin for packaging?

A. That is correct.

Q. Now we had asked Mr. Wells some questions regarding packaging and possibly you can clarify that. It was his estimate, and if he is correct so state, if not correct him,—it was his estimate, and it was merely a guess on his part, as he stated, that approximately 45 per cent of prunes that come into

(Testimony of T. O. Kluge.)

that plant go out of that plant in package or carton package form, if I understood his answer right. Is that substantially correct?

A. I would say that it would average around 40 per cent.

Q. He said 40 to 45 per cent. Now how is the balance packaged?

A. Generally in what we term "Bulk." I mean a box containing 25 to 30 pounds net. We do make occasionally shipments of prunes in bags.

Q. But you would confine it in two classes of packs, one is carton packed, and the other is bulk packed, or the carton may be a different size and the bulks may be a different size or shape.

A. That is correct.

Q. Now there is information in the file in this case that a large volume of fruit is sold directly by the association to retail distributors, such as Safeway, A and P, Red and White, and possibly others. Do you know whether or not the larger part of the fruit that is sold to these people is in carton pack or bulk pack? [37]

A. I would say from the 1947 product that by far the largest percentage was in carton or consumer packages.

Q. Now let's confine ourselves to cartons or, as you call them, carton or consumer packages,—we will just divide them into two classes for our purposes, carton and bulk. Of the carton pack what percentage of total sales is to retail distributors as compared to sales to brokers?

(Testimony of T. O. Kluge.)

A. I would say approximately 40 per cent of our sales of what you term "carton packs" go to concerns which we term chain stores, coop chains, super markets, who retail direct to the consumer.

Q. In other words, 40 per cent of your carton pack goes from your plants to a concern which is the only concern which will own and handle those prunes before they reach the hands of the ultimate consumer; is that right?

A. That is right. I would term that approximately 40 per cent of our domestic sales.

Q. Now, as regards your bulk pack, what percentage of your bulk pack is sold to concerns who in turn sell directly to consumer, and let's call those retail concerns.

A. I would have to make a guess on that.

Q. Your best guess.

A. I would say 75 per cent.

Q. In any event that proportion of the total bulk pack which is sold through brokers is by far the greater; is that it? You indicated 75 per cent.

A. I would say—through wholesalers?

Q. Wholesalers. A. Yes. [38]

Q. But they are sold to firms who in themselves will not contact the ultimate consumer until they take another step; is that it?

A. I would say, generally speaking, that is correct. There are some exceptions to it, of course.

Q. We must confine ourselves to generalities here, and there are only two classes so far as we are

(Testimony of T. O. Kluge.)

concerned. Possibly they could be broken down into 50, but it would serve very little purpose.

Now let's go to the question of the manner and methods that are used between the association and the actual grower in accounting and paying for produce delivered. Can you just talk on that rather than in response to questions and state in narrative form how that actually happens, giving the time lapses of everything.

A. Our growers manufacture the products that are delivered to this organization.

Q. May I stop you there. There is one important question. When the grower brings it to your plant is it already dried?

A. It is already dried, and that is what I meant by stating that the grower really manufactures the product.

Q. Do you do something else to it in the process of drying before the fruit is ultimately packed?

A. We do not. The fruit has to contain the proper moisture content before we will accept delivery on the product.

Q. I see. It must be in a form ready for packing at that time; is that correct?

A. That is correct, and also in a form that it will keep in storage because I previously stated that at times we may have to keep this fruit in [39] storage for a period of some 18 months.

Q. Do you clean the fruit at all?

A. We sterilize the fruit after it is removed from storage.

(Testimony of T. O. Kluge.)

Q. What is the sterilization process?

A. On prunes it is immersion in boiling water.

Q. Do you know what the process is in prunes in the drying process carried on by the grower besides laying in trays in the sun?

A. During the present period the fruit is largely dehydrated or dried by artificial means. The fruit is delivered by the producer to the dehydrator. The dehydrator will then in turn wash and what we term "dip" the fruit. Sometimes it is graded into two or three sizes, and then it goes into the drying chambers, and at the present time they are customarily called tunnels, and artificial heat is circulated over those prunes to dry them and bring them down to a proper moisture content. Then, after they are moved from the dehydrator, they go into storage for what we term a "curing process."

Q. It is all carried on by agencies other than your association? A. That is correct.

Q. Your association does not render any such service but requires that that fruit go through processes such as that or that it will obtain the same result before it reaches your receiving platform? A. That is correct.

Q. What portion of the fruit is at the present time being processed by dehydrators, commercial, private or otherwise, as compared with the old style, as I understand it, method of drying in the sun?

(Testimony of T. O. Kluge.)

A. My estimate would be in excess of 85 per cent.

Q. In this process of drying fruit are there any other agents, such as any kinds of powders or anything that are added to preserve the fruit? [40]

A. We will confine ourselves to prunes first, is that correct?

Q. Prunes, yes.

A. I would say in some dehydrators they may use a caustic solution at the time that they dip the fruit in order to cut or perforate the skin so that the fruit will dry more readily; some just use hot water for that purpose. It is customary to use a caustic solution in dipping prunes when they are sun dried.

Now there is an entirely different process for the drying of other fruits, such as apricots, peaches, pears, and nectarines.

Q. What do they use on apricots?

A. On apricots the apricots are generally taken into the cutting shed where they are cut and the pit is removed. Then they are placed on trays generally with the cut side up, and those trays are put into a sulphur house and then the fruit is subjected to sulphur fumes for a period from 6 to 12 hours on the commodities other than pears, and then they are placed in the sun in order to set the proper color. Then, after they are in the sun for that period, they are generally stacked dry.

On pears they are also cut and the calyx and

(Testimony of T. O. Kluge.)

stem removed. Generally, pears are sulphured from 24 to 56 hours, depending upon the commodity, the location and the climatic conditions.

Q. I think that gives us enough information on that phase of it. Now, as regards membership in this association, let's first put ourselves in the position of the locals. Do I understand correctly that the locals, these various local associations, each one independently incorporated or associated is made up of members confined strictly to growers?

A. That is correct. [41]

Q. There are no investors in that organization who have invested their money for profit other than the contributions of fruit and the dealings in fruit; is that correct? A. That is correct.

Q. How is membership in each one of these individual associations evidenced?

A. Generally by a membership certificate which is issued by the locals after the applicant has signed the application, the marketing agreement, and that is passed on and approved by the local.

Q. You speak of an application. What is that?

(Remarks off the record.)

What is the substance of this application?

A. The substance of the application is the procedure for the local to approve the individual who has signed the marketing agreement.

Q. In other words, an individual signs an application which in substance and on its face asks that he be allowed to become a member of a par-

(Testimony of T. O. Kluge.)

ticular association, and after that application is taken to the association do I understand from what you said that it must take an act of the association and its members to allow him to become a member? A. That is correct.

Q. Now what is the membership of the California Prune and Apricot Growers Association? Who are the members of that?

A. 28 individual locals.

Q. And each one of those locals is a separate association? A. That is correct.

Q. So that indirectly each member of each one of these associations, through his local and building up the chain to your association, is a member [42] of your association? A. Yes.

Q. How many members are there? Not in precise figures, but generally.

A. I would say at the present time slightly under 5,000.

Q. Would you be able to give me an estimate of what acreage is represented by those 5,000 members? Is that a difficult question?

A. Do you want it confined to prunes?

Q. Let's confine it to acreage in prunes, yes. And then, while you are figuring that out with paper and pencil, you can anticipate my next question which will be: What is the ratio of that acreage to the prune acreage in the area served by your association?

A. I would say that we have approximately 46,000 acres of prunes in our organization.

(Testimony of T. O. Kluge.)

Q. What is the total acreage of prunes, including those 46,000 in the area served by your association? A. Approximately 135,000.

Q. Roughly you service approximately one-third of the tonnage and acreage of the service area in which you do business?

A. I stated previously that it will average about one-third on the 1947 production; it was slightly in excess of a third.

Q. Can you answer this question? What is the relation in tonnage volume your concern does annually in prunes as compared to the tonnage of your closest competitor? I understand I can ask you to give only an estimate. I doubt if anyone could know the exact figures.

A. Yes. It is possible that that figure may vary from season to season. I would estimate that our closest competitor would handle from 50 to 60 per cent of the prune tonnage that we normally handle.

Q. So that you—according to your answer it is your opinion that you are twice as large in tonnage as your next closest competitor or substantially almost twice as large as your next closest competitor; is that right? According to your answer of 50 to 60 per cent of tonnage that is handled by yourself?

A. Well, I would say as an average that we do not handle twice as much tonnage as our closest competitor.

Q. Well, I didn't mean to confine you to the exact double, but from your estimate of 50 to 60

(Testimony of T. O. Kluge.)

per cent—well, there is no reason in asking you this other question. That answers itself.

In your experience with this association, what is the average length or life of a contract a grower makes with your organization? Does it ordinarily last ad infinitum or does it result that growers have stayed with you a period of 3 or 4 years and then have been replaced by others?

A. We have some individual growers that have been with us since the inception of the organization. We have a vast turnover of membership, and that is due to transfers of property, deaths, and general withdrawals. You understand we have a withdrawal clause which entitles the producer member to withdraw from our organization from the 14th to the 28th of February in any year.

Q. But under your contract it is your understanding that if he does not withdraw during that 14-day period he is bound to deliver to the association all of his produce in the following seasons?

A. That is correct, the following season because he will have the same privilege the next year to withdraw.

Q. Oh, I see. I was assuming there was more than one season in a year. Can you indicate to me the percentage or ratio of growth of this [44] association from year to year? Has it been the experience of the association that it is from time to time acquiring a larger percentage of total growers or does it stay more or less stable?

(Testimony of T. O. Kluge.)

A. Well, I would say offhand, without looking up the figures, that our organization was more or less static for the period from 1929 to 1946, inclusive, and since that time we show a small growth.

Q. Well, I can't think of any additional questions that will throw much more light on it.

Mr. Johnson, do you know of any other line of factual evidence that should be adduced from Mr. Kluge?

Mr. Johnson: Well, Mr. Kluge, you mentioned that the products you received are manufactured before you receive them. Will you elucidate a little further on that and explain what you mean.

A. I would say by that I mean that the grower actually prepares the product after it is harvested or removed from the tree. Now we merely do a service in terms of processing and packaging after the product has been manufactured by the producer.

I might go a step further in that to state that the ultimate quality of the product depends upon the product that the grower produces. There is no known process to materially improve the product that is actually manufactured by the grower member, and it is true that nature has a hand in the production of this crop up to the time of harvesting, but after it is harvested the performance there is similar to the manufacture of lumber or other materials.

Mr. Johnson: In other words, nature produces the tree but man produces the lumber or manufactures the lumber from the tree.

(Testimony of T. O. Kluge.)

A. That is what I had reference to. [45]

Mr. Johnson: And you have drawn an analogy in the nature of producing the prune and the grower manufacturing that prune into the product that is turned in to you?

A. That is correct.

Mr. Johnson: And was there a time, say, when you and I went to high school together when they used to take that prune and these other products just as they were received from the grower and sell them in bulk in barrels in grocery stores?

A. Well, that is even true today to a limited extent. I can take you down a block from our office and show you prunes that are on the market that come in direct from the grower.

Mr. Johnson: And sold in bulk?

A. Yes.

Mr. Johnson: In barrels or sacks?

A. They happen to be sold in a box. They will be measured out in the quantity the consumer requests.

Mr. Johnson: And that formerly was the procedure, wasn't it?

A. I would say that practically all the prunes that were sold in this immediate area during the generation that you specified were received in a natural condition, and by that I mean furnished direct by the growers themselves.

Mr. Johnson: In other words, they were finished products at that time, manufactured into that state,

(Testimony of T. O. Kluge.)

and sold in that state. What do you do in addition, if anything, to that when you receive them in your plant as a matter of up-to-date practice? [46]

A. Well, the up-to-date practice is to grade them for quality and size and then sterilize the product and put them into consumer packages.

Mr. Johnson: Is that an absolutely necessary function?

A. It is not absolutely necessary, but it is a demand and trade custom at the present time.

Mr. Johnson: Formerly and before that demand and trade custom arose the grower found his market with the products just as they are received by you at the present time?

A. Oh, yes. I can give you further illustration on that. During the pre-Hitler days thousands of tons of prunes were shipped into Germany and other countries, such as Poland, direct from the grower's property or ranch to Germany and the other countries that I mentioned.

Mr. Johnson: Does the grower now find his market with your organization? Is that the grower's market in your opinion?

A. Oh, yes, that is our grower members' market. They look to us as their marketing outlet for the commodities that they produce. We, in turn, dispose of the crop and render an accounting to them at the end of the season.

Mr. Johnson: And do you consider yourself a marketing agency mainly?

(Testimony of T. O. Kluge.)

A. We consider ourselves as a coop marketing organization.

Mr. Johnson: You stated that payment is made to the growers. Is their payment made shortly after delivery to your plants?

A. Yes. We pay the grower after delivery to our plants what we term an "advance payment," and then progress payments are made periodically. Then after the crop has been disposed of we render a final accounting and remittance to the producer members. [47]

Mr. Johnson: And that advance payment is made ordinarily how long after the delivery of the product to your plants?

A. Immediately after it is processed through the plants and our accounting office.

Mr. Johnson: And ordinarily about how much does that advance payment amount to in percentage?

A. Generally speaking, approximately 65 per cent of the field price in effect at that time.

Mr. Johnson: Now the products that you receive, are they considered by the association as being the property of the association?

A. Yes, I would say so.

Mr. Johnson: Do you feel that the grower has parted with his economic interest in his particular crop?

A. Well, yes, because your fruit—pardon me. Probably I had better answer that in my own lan-

(Testimony of T. O. Kluge.)

guage. As L stated previously the crop is delivered by the grower member, it is commingled with other fruit, and we are empowered to borrow money on that fruit if necessary; as a matter of fact, during periods from 1934 to 1938 we even borrowed money on that fruit from Government agencies on the basis of pledge certificates that were issued as collateral. If my memory serves me right, nonrecourse loans were channeled through the Reconstruction Finance Corporation.

Mr. Johnson: At that time the Government agency considered your association as the legal owner of those crops?

A. They did to the extent that they accepted our pledge certificates as sufficient evidence of ownership, and those pledge certificates were hypothecated; as a matter of fact, in that particular period not only growers [48] of our organization but nonmember producers of prunes participated in the funds that were allocated by the Government to the extent that they borrowed the money and, under the nonrecourse provision, the Government eventually owned the prunes.

Mr. Johnson: And do you at the present time borrow on those products that you have stored in your warehouses?

A. We do not find it necessary to do that at the present time although we are empowered to issue warehouse receipts if necessary and hypothecate those with banks for borrowing purposes.

(Testimony of T. O. Kluge.)

Mr. Johnson: Do you borrow from banks on the basis of the credit that you have as a result of having these products stored in your markets?

A. We borrow substantial sums from banks without any collateral, due to the fact that the title is vested in the California Prune and Apricot Growers Association.

Mr. Johnson: And these contracts that you use are the same for peaches and pears and apricots and nectarines as they are for prunes except that you just change the word?

A. I would say that is substantially correct.

Mr. Johnson: And they provide that title passes as soon as the product is delivered to your plant and that it is then commingled according to your contract?

A. That is correct.

Mr. Johnson: And that you are thereby empowered to borrow money on those products under the terms of this agreement?

A. That has been done and we still have the power to do that under the terms of the various agreements.

Mr. Johnson: In other words, you consider that they are your products, belonging to the association? [49]

A. The California Prune and Apricot Growers Association.

Mr. Johnson: Supposing there would be a fire and the grower's crop would burn as soon as he

(Testimony of T. O. Kluge.)

delivered it to the association. Would you consider that grower still owned that crop and would you charge him for the loss of the crop?

(Remarks off the record.)

We experienced a substantial fire loss during 1946. It is our responsibility to cover the products delivered by the individual members with insurance, so, consequently, there would be no loss on individual producers in case of fire or other catastrophies that may occur.

Mr. Johnson: Where did this particular fire occur?

A. Pardon me, may I continue on that? As long as the loss was more or less nominal and would not necessitate charging against the membership as a whole.

Mr. Johnson: Did you have a substantial fire?

A. We had a substantial fire which I mentioned was at Chico, California, in which the loss was in the neighborhood of $644,000.

Mr. Johnson: Did the growers whose crops were destroyed have to stand that loss themselves?

A. No, they did not. No individual grower would have had to stand any loss. If there had been a monetary loss to the association it would have resulted in a lower return on the entire crop delivery at that time. It so happened that there was no monetary loss at this particular fire.

Q. May I interpose a question at that point. Let's take a situation such as actually did occur

(Testimony of T. O. Kluge.)

which was in Chico where there was a partial loss of a crop or stored crop. Let's say it was 50 per cent. It so happened, and [50] probably does, that the only crop is prunes—let's assume they were all prunes stored in there that had come from only one of these local associations. Would the loss be amortized against the association as a whole? Would the loss be amortized against just the members of that independent association or would it be amortized against the members of all the independent associations?

A. Against all of them.

Q. That clears up that point.

Mr. Johnson: Yes. And if the grower had a fire loss immediately before he delivered or contemplated delivering to your plant or, say, the truck turned over at the gate of the plant whose loss would that be? The association's or the individual grower?

A. If it occurred prior to the time his truck entered our property it would be the individual's loss. I think we would have to confer with legal counsel as to whether or not there would be any responsibility on the part of the California Prune and Apricot Growers Association if the loss occurred after it entered our property.

Mr. Johnson: In other words, the grower is the owner of his crop until the minute he delivers it to your plant and gets a door receipt. Is that what you call the receipt given to him? A door receipt?

(Testimony of T. O. Kluge.)

A. That is correct.

Mr. Johnson: And from that time on you consider as marketed his crop and you are the market agency from then on?

A. That is correct.

Mr. Johnson: And he has parted with his economic interest in that crop and is entitled to an interest in the pool only; is that right? [51]

A. Well, that is a pretty broad statement. I may answer it to this effect. He has parted with the commodity; he still has an interest in the accounting in money.

Mr. Johnson: Well, is that any different from a grower delivering to, say, Rosenberg's or the California Packing Corporation?

A. Oh, no, I wouldn't say so.

Mr. Johnson: Is it exactly the same situation?

A. To the extent that our contract applies. I am not indicating here that our procedure, as far as cooperative marketing is concerned, is identical with the commercial packer, but I would say, as far as title of the commodity is concerned, the minute the fruit is delivered it is similar to a delivery made to a commercial operator.

Mr. Johnson: And in both instances, with the commercial operator and with your association, all the grower has is the right to an accounting in money?

A. That is correct.

Mr. Johnson: Now could you tell us anything

(Testimony of T. O. Kluge.)

about the labor turnover at your plants, Mr. Kluge? Mr. Wells has a letter that has been introduced in evidence indicating that employment records show a low of 334 employees and a peak of 1,574 people employed by the association. Does that represent all of the people that are employed there regularly, or is there a large labor turnover?

A. During and since the last war there has been a large labor turnover.

Mr. Johnson: What would you say the percentage is? [52]

A. I would say that during certain periods it may be as high as 100 per cent.

Mr. Johnson: Is that your estimate also, Mr. Wells? You are the personnel director.

Mr. Wells: Yes, it is, Mr. Johnson, during the seasonal parts of the year we are in operation.

Mr. Johnson: Had you figured your labor turnover for last year or do you have any more definite figure you can give us?

Mr. Wells: Yes. In 1947, the labor turnover for the 12 calendar months, January through December, was 102.6 per cent.

Mr. Johnson: Could I continue there with Mr. Wells, Mr. Referee?

(Remarks off the record.)

Mr. Johnson: Mr. Kluge, do a great number of your employees work for these commercial competitive concerns?

A. They have especially and they do especially

(Testimony of T. O. Kluge.)

since we have had union agreements in effect in our plants.

Mr. Johnson: Is it customary for them to go, for instance, from canneries when the canning season is over to your plant, and vice versa?

A. Oh, yes, that happens repeatedly. By the same token, we may have an employee or a number of employees working for us for a certain period, next week he may be working for Rosenberg Brothers, and could go the following week to the Cal-Pac or Richmond-Chase, and then he may come back to our plant for a short period.

Q. Mr. Johnson, again I say I don't want to forclose you from any particular line of questioning that might be pertinent, but can't we, let's say, take judicial notice of the fact that it is known in this packing industry in all regions, or in most regions, let's say, and especially this [53] one, that the labor is quite itinerant and works in the same industry that goes from plant to plant, and we recognize that fact that one laborer may work one day doing the same work for one employer in a covered industry, and, as the matter stands today, comes to this organization and works in what is construed to be noncovered and performs the same duties under the same working conditions, for the same money, and under the same labor contract, let's say. Woudn't that suffice for the purpose of the record?

Mr. Johnson: Yes, I imagine it would, if you take judicial notice of that fact that there is a

(Testimony of T. O. Kluge.)

large turnover, and right now with the others all ruled under coverage that there would be an injustice worked on these employees.

Q. That would follow as a legal argument.

Mr. Johnson: Yes.

Could I ask about apricots and peaches, for instance. What would happen to them if they weren't sulphured, if they were allowed to stand for any time after they were picked?

A. They would have a tendency to immediately darken.

Mr. Johnson: Would they turn real black after a period of time?

A. They would after a short period of time and they wouldn't be acceptable to the trade and consumer.

Mr. Johnson: So that in all cases where they are brought to your association they have been sulphured and processed?

A. Oh, yes. As a matter of fact, we even go so far as to take the sulphur content of the fruit at the time it is delivered so that we will know which fruit to process and pack on particular orders that we may receive. [54]

Mr. Johnson: And have you right along considered that your association is engaged in commercial work?

A. As to its physical operations, yes.

Mr. Johnson: And have you always considered that you were under coverage of the Social Security

(Testimony of T. O. Kluge.)

Act, and paid the social security tax and deducted for the employees?

A. We have, and I think we have gone on record to that effect.

Mr. Johnson: And you have also paid the State unemployment compensation tax right along?

A. We do.

Mr. Johnson: And are under that coverage?

A. Yes.

Mr. Johnson: The law has not been changed, it has always covered the employees of your plant ever since the inception of the Social Security Act?

A. That is right, yes. I might state that we also deduct the withholding taxes on our employees.

Mr. Johnson: And have you been acting under legal advice in deducting the 1 per cent social security tax right along?

A. Naturally we have, especially when we were requested to discontinue that practice, and a decision was reaffirmed by our attorneys to continue the deductions.

Mr. Johnson: I think that is all.

Q. Before you arrived, Mr. Kluge, we asked Mr. Wells some questions relative to the constitution and by-laws of this organization, and Mr. Hagar has offered to submit and offer for the purpose of the record at least one mimeographed copy of the constitution and by-laws. You are familiar with them? [55] A. Generally speaking, yes.

(Testimony of T. O. Kluge.)

Q. You would be in a position, when it is submitted to me by mail, to certify that to the best of your knowledge it is a true copy of the original constitution and a true copy of the by-laws?

A. I would be glad to, or, if you prefer, we will have the secretary of the organization certify it to that effect.

Q. Do each of these locals have their own constitution and by-laws? A. Yes, they do.

Q. Are they a standard form of constitution and by-laws, or are they each different from each other?

A. There are numerous provisions that are not exactly alike in the by-laws, but I would say that they are substantially correct. The differences may be as to the methods of holding annual meetings, elections, amendments to the by-laws, etc.

Q. Would it be possible to make available for the purpose of this record one set of constitutions and by-laws of one of these local organizations which would be typical, generally speaking, disregarding small technical matters, but on large, general matters which point to the relationship between this local association and each of its members which would be typical of all the others?

A. We will be glad to furnish you with a copy.

Q. Very well, Mr. Hagar, go ahead. Do you have some questions?

Mr. Hagar: Mr. Kluge, to whom was this $644,000 loss paid by the insurance company?

A. To the California Prune and Apricot Growers Association. [56]

(Testimony of T. O. Kluge.)

Mr. Hagar: Does the California Prune and Apricot Growers Association carry insurance on the fruit after it is delivered to them?

A. It does.

Mr. Hagar: Do you know whether or not the individual grower or the individual local carries insurance?

A. They do not carry any insurance after the commodity is delivered to the California Prune and Apricot Growers Association.

Mr. Hagar: You spoke of approximately 85 per cent of the prunes being dehydrated. Do most growers own their own dehydrators?

A. I would say not. That is based on my own individual estimate, of course.

Mr. Hagar: And these dehydrators that are not owned by the individual growers are not located on the farm of any particular member; is that correct?

A. Will you ask that question again, please.

Mr. Hagar: Where the grower member does not own his own dehydrator the dehydrator is not located on the farm of a member?

A. No, it is not.

Mr. Hagar: In what condition are the prunes delivered to the dehydrator by the grower?

A. In what is termed as a fresh state.

Mr. Hagar: By that you mean what?

A. Prunes immediately after they are picked, and before they are dried or manufactured.

Mr. Hagar: With regard to the various plants of the association, take your plants here in San Jose,

(Testimony of T. O. Kluge.)

—do you ship in interstate commerce to [57] various parts directly in the United States?

A. We do.

Mr. Hagar: Do you ship directly from those plants to various parts in the world?

A. We do.

Mr. Hagar: That is all.

Q. Mr. Johnson, do you have any questions?

Mr. Johnson: Mr. Kluge, I would like to show you a picture of the plant and see if you recognize it as plant No. 11 of your association.

A. That is plant 11, located on Cinnabra Street in San Jose.

Mr. Johnson: That is within the city limits of San Jose, is it?

A. Yes, it is.

Mr. Johnson: I will show you this map of the city limits of San Jose depicted in green and ask you if this is somewhere near the center of the city limits of San Jose as shown by this map. (Shows map to witness.)

A. Oh, generally speaking, yes.

Q. Are you offering this picture as an exhibit? This picture will be taken into evidence, and without offering the map into evidence from the testimony given I understand this is a plant which is not adjacent to any land upon which fruit is grown. Is that the point?

Mr. Johnson: Yes, that is the point. Does the association own any land upon which fruit is grown?

A. We do not.

(Testimony of T. O. Kluge.)

Mr. Johnson: Do they lease any such land?

A. We do not.

Mr. Johnson: This not being adjacent to any such land, is it adjacent to a railroad? [58]

A. It is on the main line of the Southern Pacific Railroad in San Jose. There are also facilities for truck movement to various localities in California and interstate, and also the plant is available for local firms to pick up fruit for distribution to consumers.

Mr. Johnson: This railroad that is depicted in this picture as adjacent to this plant, is that a transcontinental railroad?

A. It is.

Mr. Johnson: This siding on which these cars appear, some seven or eight cars or more in this picture, is that a siding connected with that railroad?

A. Yes, and it serves our plant No. 11.

Q. You are referring to Exhibit M?

Mr. Johnson: Yes. And those cars are inside of this wire fence, I noticed.

A. Yes.

Mr. Johnson: Is the wire fence the boundary of your property?

A. Not all of it. Some of that property within the wire fence is leased from the railroad company.

Mr. Johnson: But the cars run right up to your plant and the products are unloaded from the platform of your plant right into these cars?

A. Yes. We have different arrangements at

(Testimony of T. O. Kluge.)

various of our plants with respect to the ownership of the property on which these tracks are located. Some of the property is leased from the railroad company, and other properties are owned by the California Prune and Apricot Growers Association.

Mr. Johnson: And I notice this truck there at a loading platform of your plant. Is that the usual road where such trucks are loaded? [59]

A. That is one of the loading platforms for shipment to various points or ports in California. We also have another loading or shipping platform for serving trucks for the same purpose.

Mr. Johnson: And do you also ship by boat to foreign countries?

A. We do.

Mr. Johnson: And in the different plants that you have the conditions are somewhat similar so that you would be shipping there to all parts of the world from each of your plants?

A. That is true.

Mr. Johnson: Would you consider each of your plants a terminal market for connection for consumption?

A. We do.

Mr. Johnson: I have three extra copies of this photograph if you need it, Mr. Referee.

I have one other question. In your letter of April 29, 1948, which is in evidence, you state that the association had not applied for or been granted an exemption under section 101(1) of the Internal

(Testimony of T. O. Kluge.)

Revenue Code. Do you feel that you would have any ground for asking for such exemption?

A. Not to my recollection, we would not come under the exemption provisions of that section.

Mr. Johnson: I think that is all.

Q. Do you have some letters that you wish to introduce at this time? Some rulings?

Mr. Johnson: Yes. I would like to ask Mr. Hagar a few questions first. Could I have him sworn? [60]

Q. I have just been wondering if that would be entirely proper since your questions would probably be asking his opinion of what the interpretation of this law is. It is my duty and the duty of the courts to pass upon this. I don't know whether it would be pertinent. (Further remarks off the record.)

Mr. Johnson: Could you make a brief statement as to your opinion as to the coverage of this act?

Mr. Hagar: Yes.

I have been the attorney for the California Prune and Apricot Growers Association, and I originally advised the association that the employees would come under the Social Security Act. My opinion was asked subsequent to that time, at the time the rulings came out and I advised them for a second time that they were subject to the Act. I felt that it was the clear intent of Congress that they should be covered by reason of the fact that the association, in my opinion, was engaged in manufacturing activities; that the fruit, after delivery to it, came

to rest in its warehouse and was kept there at times for many months and sometimes well over a year; that in connection with future crop years, particularly with regard to prunes, it was always the question of how much the carry-over from the preceding crop was which would indicate there are times when there is a problem in that the fruit of one crop year would be carried over until an additional crop year; that these plants were located on transcontinental railroads, the shipments were made to all parts of the world; that under that North Whittier Citrus Association case, if I remember correctly, that the association was not engaged in agricultural work but was engaged in the manufacturing and sales of the particular commodity that in my opinion, under the terms of the contract, the title had passed and therefore the grower member had no more interest in the fruit [61] except an interest in the proceeds; that the contract requires that the fruit (and I am quoting from the contract) "be delivered in merchantable condition." Therefore, if it is delivered in merchantable condition whatever work that the association did subsequent to that time would of necessity have to relate to manufacturing; that the types of merchandising had very materially changed in the last 20 years, where the fruit was originally prepared on the farm now the condition was changed so that the work that the association did in connection with the processing of the fruit was changed, and with it the manufacturing as distinguished from agricultural; that the plants of the association were not located adjacent

to any farm or had any contiguous property to a farm.

With those reasons, in general, I felt, although I probably could find a memorandum with considerably more reasons—at any rate I originally advised the association and have continued to advise the association, and still am of the opinion that the employees are covered, particularly where the employee of the association does the same identical work for a commercial handler, handling exactly the same type of product, prunes, and in one case is covered without any question by reason of the two recent decisions; in my opinion, where he performs this work for the association he is covered.

Question has been asked as to the exemption of the association. It is exempt, under the Internal Revenue Code, section 101(1)(12) from paying any income tax or filing returns, and originally so received a ruling from the Treasury Department, and on several times subsequent to that original ruling which was many years ago the Treasury Department has reaffirmed that ruling. I do not think that it would be exempt under section 101 of the Internal Revenue Code—101(1) for the purpose of the record.

Q. Mr. Johnson, is that the statement you wanted him to make? [62]

Mr. Johnson: You had anticipated the decision of the higher courts in the Burger and Bettencourt cases and so ruled years ago in 1939 or '40?

Mr. Hagar: Well, I don't know that "anticipated" is the correct word, but I was strongly of

the opinion, and still am, that they are and that those decisions were correct and coincided with my original ideas.

Mr. Johnson: How long have you been an attorney for the association?

Mr. Hagar: Since 1936.

Mr. Johnson: I wanted to ask Mr. Kluge if he could show any essential difference between the marketing of dried fruit and the marketing of fresh fruit with reference to the time element.

Mr. Kluge: Well, fresh fruit has to be marketed immediately or as fast as it can get to market. Dried fruit is not a perishable commodity and can be kept in storage for a number of months, whereas fresh fruit cannot.

Mr. Johnson: Do you know anything about the practice of marketing fresh fruit? Isn't it consigned to different shippers in the east and rerouted on occasions? Isn't there a difference between your practice and the way the fresh fruit packers handle it?

Mr. Kluge: From my limited knowledge, fresh fruit is generally started east and then diverted to the market which will afford the best price or has the lowest volume of the particular variety of fruit on hand at that time, and occasionally they are sold at auction. That is just my offhand knowledge of the fresh fruit business. As far as the dried fruit business is concerned, invariably the distinction is known, the buyer is known, and the price is known before the shipment is made.

Mr. Johnson: And when you sell through bro-

kers do you deliver to the brokers or do you deliver to the retailers that the broker represents?

Mr. Kluge: We do not customarily deliver or sell to brokers. The broker acts as the agent of the buyer and seller, and the fruit is shipped directly either to the wholesaler or shipped directly to the chain super-market or other forms of retailer, the distinction being that we sell to chain or large organizations for retail purposes, but do not sell to a corner independent retail store.

Mr. Johnson: I think that covers the situation, Mr. Referee.

Q. Do you have some letters you wanted to submit for the record at this time?

Mr. Johnson: Yes, I did. First of all, I wanted to submit copies of the previous rulings of the Internal Revenue Department. (Hands papers to referee.)

Q. Exhibit N will be a mimeographed copy of the Treasury Department Collector's No. 6219, dated December 31, 1947.

Taken into the record as Exhibit O will be a copy of the Treasury Department mimeographed Collector's No. 6239, dated March 1, 1948.

Taken in as Exhibit P is a Federal ruling under Internal Revenue Code designated as 487-SST-405 (copy).

Taken in as Exhibit Q is a copy of a ruling 8-SST-10.

Exhibit R is a decision and notice of decision of the Appeals Council in Case No. 12-139, being the Penn case.

Taken into the record as Exhibit S is a decision and notice of decision in the case No. 12-92 of the Appeals Council, being the Grimley case.

Exhibit T is a copy of the decision and notice of decision in Case No. 12-92, the Grimley case.

Can I assume, Mr. Johnson, that on behalf of your client you would propose that I make a finding that the services performed by the [64] deceased wage earner since 1939 for the California Prune and Apricot Growers Association was not in agricultural labor?

Mr. Johnson: That is correct.

Q. And that as a result thereof the credits for earnings he received from such employment constitute him a fully insured individual, and his surviving widow and their two minor children, for the period of their minority, are entitled to benefits subject to deductions for employment which they engaged in?

Mr. Johnson: Yes.

We have read the foregoing transcript and certify that it is a true and complete record of the hearing.

Date: June 3, 1948.

/s/ MARTIN TIEBURG,
Referee.

/s/ MIRIAM GARNER,
Hearing Reporter. [65]

REOPENING OF RECORD

In the Case of Mary R. Baiocchi (Claimant), Case No. 12-1093. Claim for Widow's Current Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Leola D. Baiocchi (Claimant), Case No. 12-1094. Claim for Child's Insurance Benefits.

In the Case of Mary R. Baiocchi on Behalf of Geraldine Baiocchi (Claimant), Case No. 12-1095. Claim for Child's Insurance Benefits.

In the Case of Almando Baiocchi (Wage Earner).

Social Security Account No. 552-14-0672.

The record in the above-captioned matter is this day reopened and there are hereby introduced thereunto by order of the referee the following exhibits:

U—Copy of Articles of Incorporation and By-Laws of the California Prune and Apricot Growers Association ..... ——

V—Copy of Articles of Incorporation and By-Laws of the Glenn County Prune and Apricot Growers, Inc. ..... ——

The above matter is now closed and hereby submitted for decision.

Date: June 8, 1948.

/s/ MARTIN TIEBURG,
Referee. [66]

EXHIBIT C

Federal Security Agency
Social Security Board

Request for Reconsideration

In the Case of Mary P. Baiocchi (552-14-0672 E) (Claimant); Almando Baiocchi (Wage earner), Social Security account number 552-14-0672. Claim for Widow's benefits and support for two minor children under 18.

To the Social Security Board:

I disagree with the determination made on the above claim, and therefore request a reconsideration by the Bureau of Old-Age and Survivors Insurance.

Remarks: (If you wish you may use this space for statement of reason for disagreement.)

I filed claim on July 18, 1945, on behalf of myself and two minor children under 18, Leola D. Baiocchi (552-14-0672-C2) and Geraldine Baiocchi (552-14-0672 C1). Adjustment of my claim was held up pending the determination of the Federal courts in the Bettencourt and Burger cases. Now that these cases have been finally decided in favor of coverage for the dried fruit packing house workers, I feel that my benefits, and those of my two minor children, should now be awarded, just as benefits were awarded by the Appeal Council to Edgar T. Penn (554-03-8307A) and Marguerite K. Grimley (554-03-7972), who worked for the same

concern that my deceased husband did—the California Prune and Apricot Growers Association, a commercial cooperative engaged in the packing of dried fruits in a terminal market for distribution for consumption.

I therefore respectfully ask that the benefits due me and my children be recomputed in the light of the court decisions in the Bettencourt and Burger cases and the court mandates issued therein ordering the Social Security Administration to consider workers engaged in this entire dried fruit industry as covered employees and entitled to the benefits of the Social Security Act.

I attach lists showing earnings of my children and myself since filing claim.

Date: November 8, 1947.

/s/ MARY BAIOCCHI,
Claimant.
221 Cleaves Ave.,
San Jose, Calif.

/s/ ARTHUR L. JOHNSON,
Authorized Attorney,
202 Porter Bldg.,
San Jose, Calif. 72]

EXHIBIT E

Federal Security Agency
Social Security Board
Washington

552-14-0672-E
14:AO:C2
March 26, 1948

Mrs. Mary R. Baiocchi
221 Cleaves Avenue
San Jose, California

Dear Mrs. Baiocchi:

This letter refers to your claim under Title II of the Social Security Act on your own behalf and on behalf of Leola D. and Geraldine Baiocchi based on the wages of Almando Baiocchi. The action on this case is also in reply to your request for a reconsideration.

Under the Social Security Act, no lump-sum or monthly benefits are payable unless the wage earner was fully or currently insured at the time of his death. To meet these requirements, the wage earner must have been paid wages of at least $50 in employment covered by the Social Security Act in each of 17 calendar quarters beginning January 1, 1937, or he must have been paid wages of $50 or more in covered employment for each of not less than 6 of the 12 calendar quarters immediately preceding the quarter in which he died.

Our records show that neither of these requirements has been met; therefore, no payment may be made based on the wages of the deceased.

Pay received from the California Prune and Apricot Growers Association after 1940 except for five calendar quarters could not be included because the work was agricultural labor.

If you disagree with this determination you may request that a hearing be held on your claim by a referee of the Social Security Administration. A request for a hearing should be made promptly and not later than three months from this date. If you desire a hearing, you should call at or write to the field office at Room 1003, 28 North First Street, San Jose 14, California, for assistance.

Very truly yours,

JOSEPH C. COLUMBUS,
Chief, Area Office.

Case No. 12-1093,
12-1094,
12-1095. [78]

EXHIBIT F

Federal Security Agency
Social Security Board

Bureau of Old-Age and Survivors Insurance

REPORT OF CONTACT

Office: San Jose, Calif.
Date: 4/28/48.
Account No. 552-14-0672.

(This form must be filled out in ink or on typewriter, as it becomes a permanent record.)

Name: Almando Baiocchi (Employee about whom contact is made).

Person contacted: Thomas Miller (To whom information is given or from whom received).

Contact made by telephone (In person or by telephone).

Address: Deceased.
Secretary, Calif. Prune and Apricot Growers Assn., San Jose, Calif.

Place of contact: San Jose, Calif.

Give brief statement of information requested and given:

In order to obtain additional information as to the nature of the Calif. Prune and Apricot Growers Assn., a telephone call was made to Mr. Miller, Secretary of the Association. In addition to information already contained in the file, the following was obtained:

The Association received prunes, apricots, peaches, pears, nectarines, etc., in a dried state (they handle no fresh fruit) from the growers in lots of tons or portions of a ton. They give the grower a door receipt—after which the dried fruit is graded and placed in bins with fruit of a like quality and size from other growers. The grower is then mailed a grade receipt and the fruit has lost its identity.

The plants act as warehouses and the dried fruit remains in the bins until a purchase order is received. They usually start packing, processing, etc., soon after the dried fruit begins to come in

from the grower, but no processing or packing is done until a purchase order is received, some of the dried fruit remains in the bins for a year or more, with sometimes a carryover to the next year —but probably never remaining in the bins as long as two years.

Upon receiving a purchase order from such organizations as Safeway Stores, A & P Stores, Red & White Stores, etc., or from brokers, they process and pack the dried fruit in containers as per order —one or two and as high as eleven pound paper cartons and up to twenty-five pound wooden boxes. The cartons or boxes are labeled in accordance with the purchasers wishes. However, over 50% are actually packed and sold under their own label. Others packed in packages labelled as the purchaser wishes.

Growers are paid for the fruit according to plan as income is received by the association.

The association is of the belief that their plants are terminal markets and differ materially from fresh fruit and fresh vegetable packing plants. Fresh fruit and fresh vegetable packers pack their produce, which to begin with are in their natural state, and ship to agents in eastern markets who act for any number of other shippers or packers. The produce is then bid for by many wholesalers and even retailers. In other words the packer and/or shipper does not consign produce to particular buyers upon order but ships to an agent

who may or may not be able to dispose of the produce depending upon the demand.

The association's produce is received from the grower in an unnatural state (it having been dried by the grower at the orchard) and then stored in bins until ordered by a particular firm which directs the association to pack the dried fruit in a certain type of container and in certain pound packages.

A. L. B.

Contact made by

/s/ ALBERT L. BENELISHA,
Acting Manager.
San Jose, Calif. [79]

[Stamped]: Bureau of Old-Age and Survivors Insurance. May 10, 1948, 12:59 p.m., San Francisco Area Office Accounting Section. [80]

ORIGINAL

PRU 'E MARKETING AGRE MENT

88

THIS AGREEMENT made by and between

_____

a non-profit, co-operative marketing association, hereinafter called the Local, first party, and the undersigned Grower, second party.

WITNESSETH:

IN CONSIDERATION of the mutual obligations herein expressed and of the membership of the Grower in the Local, and in accordance with similar obligations undertaken by others, the parties agree:

1. Local agrees to buy and the Grower agrees to sell and deliver to the Local all of the prunes produced or acquired by or for him in California during the years _____ to _____ inclusive. This agreement may be terminated at any time during any year after _____ by the Local or by the Grower by a notice mailed to the Grower or the Local by registered mail between February 15th and the last day of February of said year; said termination to take effect on March 15th of the year in which said notice is delivered, provided, however, that this agreement shall remain in full force and effect as to all prunes delivered to the Local prior to such termination and until the sale of such prunes and the payment of the proceeds thereof to the Grower. Notice must be mailed within the period named herein to be effective, and shall be mailed to the Local at its principal place of business and to the Grower at his last known address.

2. The Grower expressly warrants that he is now in a position to control said crops and would be able to deliver according to this agreement; and that he has not heretofore contracted to sell, market or deliver any of the said prunes to any person, firm or corporation. If he has so contracted, he shall so state at the end of this agreement, and any crops covered by any such existing written agreement shall be excluded from the terms hereof to the extent and for the time there indicated.

3. (a) All prunes shall be delivered by the Grower at the earliest reasonable time when ready; and, in any event, prior to December 15th in each year, as and where directed by the Local or the Central Sales Agency hereinafter referred to. Where the packing plants of the Local or its subsidiary are distant from the common delivery points, the Local may, in its discretion, assume the cost of transportation from the common shipping points to its packing plants.

But delivery shall not be deemed to have been made hereunder except at the plants or grading points designated by the Local or the Central Sales Agency hereinafter referred to.

(b) Any deduction or charge or loss that the Local or the Central Sales Agency may make or suffer on account of inferior grade, quality or condition at delivery, shall be charged against the Grower individually.

(c) The Local or the Central Sales Agency shall make rules and regulations regarding handling and delivering, and provide inspectors and graders to standardize, grade and classify the prunes; and the Grower agrees to observe and perform any such rules and regulations and to accept the grading and standards established by the Local or the Central Sales Agency.

(d) All prunes shall be delivered in properly dried and merchantable condition. The determination of the Local or the Central Sales Agency as to grade, standard and classification and differentials in prices, shall be conclusive.

4. The Local or the Central Sales Agency shall pool or mingle the prunes of the Grower with prunes of a like quality or grade delivered by other growers. The Local or the Central Sales Agency shall classify prunes by size, grade, variety or any other commercial standards; and this classification shall be conclusive.

5. The Local agrees to resell such prunes, together with prunes of like quality, grade and classification delivered by other growers under substantially similar contracts in their original form, or manufactured or as by-products or otherwise at the best prices obtainable under market conditions and to pay over the net amount received therefrom as payment in full to the Grower and Growers named in contracts substantially similar hereto, according to the value of the prunes delivered by each of the growers after deducting therefrom the costs of receiving, handling, packing, manufacturing, storing, depreciation, advertising and marketing and an investment charge of not to exceed 5% of the gross resale proceeds. From this charge, a commercial reserve may be created and deductions made for the creation of the capital funds of the Local, provided for by the by-laws thereof. The annual surplus from any deductions made by the Local and not prorated to any specific fund must be prorated among the growers delivering prunes in that year on the basis of their respective deliveries.

6. (a) The Grower agrees that his prunes shall be so mingled and that the net returns therefrom, less all costs, advances and charges, shall be credited and paid to him on a proportional basis, considering all differentials and adjustments, out of the receipts from the sale of all prunes of like quality, grade and classification.

(b) The Local agrees to pay an substantial an advance payment on the prunes as the market and financial conditions will permit, as determined by the Board of Directors in each season and such payments shall be made as soon as practicable after delivery of the prunes to it; and such advance payments may be proportionately higher for fruit classified in more desirable grades or sizes from a commercial standpoint.

(c) Payment on each pool shall be made from time to time, as rapidly as possible, in due proportion, until the accounts of each pool of the season are completely settled

7. The Local may exercise all of the packing, marketing and grading and inspection or other powers and rights herein granted to it, and perform all obligations herein assumed by it, through California Prune and Apricot Growers Association as a Central Sales Agency, the Grower recognizing that this Local has or will become a member of the California Prune and Apricot Growers Association and has or will contract with the California Prune and Apricot Growers Association to deliver all of the prunes and apricots handled by it to the California Prune and Apricot Growers Association for packing and marketing, and the Grower agrees that the Local may enter into any contract with the California Prune and Apricot Growers Association for such purposes and may agree to pool the prunes delivered hereunder with prunes of a similar grade and quality delivered by similar Locals under marketing agreements substantially similar to this, and the proceeds thereof shall be divided ratably according to deliveries from such Locals and shall be distributed to the grower members thereof as above provided.

8. Any cost of maintaining the California Prune and Apricot Growers Association shall be prorated among the said Locals on the basis of the the gross sale value and quantity of the prunes delivered by them respectively and shall be considered for all purposes as a part of the costs and deductions provided for in Paragraph 5 hereof.

9. The Grower agrees that title to said prunes passes absolutely to the Local upon delivery thereof by the Grower to the Local and that the Local may transfer title to the Central Sales Agency, and the Grower agrees that the Local or the California Prune and Apricot Growers Association shall have and it is hereby given the power to borrow money and to incur indebtedness in the manner and to the extent as provided in the agreement between the Local and the California Prune and Apricot Growers Association.

10. The Grower shall have the right to retain and to sell all or part of his fruit green for green use or canning only; and only to persons, firms, or corporations approved and listed by the Local or Central Sales Agency in its regular publication or by notice to the growers, as approved Buyers.

11. If this agreement is signed by the members of a co-partnership it shall apply to them and each of them individually in the event of the dissolution or termination of the said co partnership.

12. If the Grower transfers any or all of his prune orchard or any or all of the prunes owned or controlled by him to any person, firm or corporation, on or after March 15th of any calendar year, any such transfer shall be deemed to be subject to this contract during the calendar year in which such transfer shall have been made, providing that this contract shall not have been terminated in such year, and such transferee shall be deemed to be obligated to deliver the prunes hereunder. In the event of the failure of the transferee to deliver said prunes, the Grower shall be obligated to the Local for liquidated damages hereinafter provided on the basis of the amount of fruit covered directly or indirectly by such transfer, in addition to the other remedies granted herein.

13. This agreement is one of a series generally similar in terms comprising with all such agreements, signed by individual growers, or otherwise, one single contract between the Local and the said Growers, mutually and individually obligated under all of the terms thereof. The Local shall be deemed to be acting, in its own name, for all such growers in any action or legal proceedings on or arising out of this contract.

14. (a) Inasmuch as the remedy at law is and would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine or fix the actual damage resulting to the Local if the Grower fails to sell and deliver to the Local all of said prunes as herein provided, the Grower agrees to pay to the Local as liquidated damages for the breach of this contract in that regard twenty percent (20%) of the total market value of the prunes withheld, delivered, sold, consigned or marketed by or for him other than in accordance with the terms of this agreement, said market value to be determined as of the time that demand for shipment of said prunes is made by the Local, or if said prunes have been sold by the Gruwer, then the price for which said prunes shall have been sold shall be taken as the market value thereof

(b) If the Local brings any action against the Grower to enforce any provision of this agreement or to secure specific performance hereof or to collect damages of any kind for any breach hereof, the Grower agrees to pay to the Local all costs of court, costs for bonds and otherwise, expenses of traveling and all expenses arising out of or caused by the litigation, including a reasonable attorney's fee expended or incurred by the Local in any such proceeding, and all costs and expenses shall be included in the judgment obtained in said action.

15. All books, accounts and other documents affecting the business to be carried on by the Local shall at all times during business hours be open to the inspection of the Grower or any person designated by him who may present proper evidence of authority to make such examination

16. The parties agree that there are no oral or other conditions, promises, covenants, representations or inducements in addition to or at variance with any of the terms hereof, and that this agreement represents the voluntary and clear understanding of both parties fully and completely

READ, CONSIDERED AND SIGNED AT _____ California,

this _____ day of _____, 19____

Grower _____

ACCEPTED, this _____ day of _____, 19____

P. O. Address _____

_____ Association,

By _____

Secretary.

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EXHIBIT K

Ex 89

89

CALIFORNIA PRUNE AND APRICOT GROWERS ASSOCIATION
LOCAL-CENTRAL CONTRACT

THIS AGREEMENT made and entered into this ..... day of ..... 19 ..... by and between the CALIFORNIA PRUNE AND APRICOT GROWERS ASSOCIATION, a non-profit, co-operative marketing association organized under the laws of the State of California, hereinafter referred to as the Central Sales Agency first party, and various local marketing associations, corporations organized and existing under the laws of the State of California, hereinafter referred to as Locals, of which the undersigned is one, second parties,

WITNESSETH:

WHEREAS the second parties have been organized for the purpose of marketing the prune, apricot and other dried fruit products of their members, and second parties desire to unite in the marketing of their products for the purpose of obtaining the further benefits of co-operation in distributing through a common sales agency,

NOW, THEREFORE, in consideration of the premises and the mutual covenants on the part of each of the parties herein contained, it is agreed:

1. TERM OF AGREEMENT.

(a) This agreement shall be effective as of..... ..... 19..... , and shall continue in full force and effect until December 31, 1958, unless sooner terminated as to one or more or all of the parties hereto at the time and in the manner herein provided.

(b) The Local, if said Local has acquired from the Central Sales Agency, or otherwise where the Central Sales Agency has no suitable property, the facilities to receive, store and pack the fruit of its members, may withdraw from this agreement as of March 15th of any year, provided said withdrawal shall have been authorized by a two-thirds vote of its membership at a meeting held ten days' notice to its members and to the Central Sales Agency, and the Central Sales Agency may terminate this agreement as to one or more Locals as of said date, upon giving written notice to the other of such party or parties during the period from March 1st to March 10th of said year of their intention to so withdraw or terminate. Said notice shall be complete when deposited by Central Sales Agency or Local in the United States Post Office, registered mail, at the place where the principal place of business of Central Sales Agency or Local is at the time situated, postage fully prepaid, said notice to be addressed to said Central Sales Agency or Local or Locals, as the case may be, at the place or places where at the time its principal place of business is situated.

Said notice must be mailed within the period stated herein to be effective. Withdrawal or termination of this agreement shall not affect in any manner any of the parties hereto not withdrawing, as to which parties this agreement shall remain in full force and effect and shall not affect any prunes, apricots or other dried fruits delivered by the Locals by which or as to which said contract is terminated prior to such termination, and such prunes, apricots and other dried fruits shall be handled and marketed the same as if said contract were continued in full force and effect.

2. PURCHASE AND SALE OF PRUNES, APRICOTS AND OTHER DRIED FRUITS.

The Central Sales Agency agrees to buy and the Local agrees to sell and deliver to the Central Sales Agency all of the prunes, apricots or other dried fruits produced or acquired or controlled by such Local during the time this agreement shall be in force as to said Local.

The term apricots herein shall include apricot pits from dried apricots, and all provisions for the marketing, pooling and distribution of proceeds of prunes, apricots or other dried fruits shall apply thereto.

3. GRADES AND QUALITY.

The Central Sales Agency shall have full and complete power and authority to prescribe and enforce such rules and regulations and standards regarding the handling, delivering, grading, classifying, processing, and manufacturing such prunes, apricots and other dried fruits, as its Board of Directors shall determine and each Local agrees to strictly and promptly conform to such rules and regulations and to standardize, grade, classify, process, and manufacture the prunes, apricots and other dried fruits in accordance with the instructions of the inspectors appointed by the Central Sales Agency. The standards to be established by the Central Sales Agency shall be based on the quality of fruit and not on geographical lines or district representation.

All prunes, apricots and other dried fruits shall be delivered in properly dried and merchantable condition and each Local shall be responsible for the quality and grade of any and all prunes, apricots and other dried fruits sold and delivered by it to the Central Sales Agency under this agreement and no charge shall be made against any pool to which such (prunes, apricots and other dried fruits) belong on account of the fact that such prunes, apricots and other dried fruits are not of the proper quality when delivered, but such loss shall be borne entirely by the Local delivering the same.

The Local, when it shall have facilities so to do, shall pack all prunes, apricots or other dried fruits received by the Local and sold through the Central Sales Agency in containers as may be directed by the Central Sales Agency, it being understood and agreed that no Local without the consent of the Central Sales Agency shall pack prunes, apricots or other dried fruits in specialty packages, such as carton packs and the like. If the Central Sales Agency shall pack prunes, apricots or other dried fruits in such specialty packages, the Locals shall ship prunes, apricots or other dried fruits to the Central Sales Agency as requested by it to be used for such purposes. The Local when it shall have packing facilities, shall receive an allowance to be fixed on a uniform basis annually for all Locals for prunes, apricots and other dried fruits shipped by it to or at the direction of the Central Sales Agency, such allowance to be based on the type of package in which said prunes, apricots or other dried fruits shall be shipped, such as boxes, bags or the like, and which allowance shall be paid to the Local for the costs incurred by it in receiving, handling, and shipping the prunes, apricots and other dried fruits delivered to it. Such allowance shall be at least equal to the average cost incurred by the Central Sales Agency in similar operation of other plants and shall be at least equal to the average cost incurred by the Central Sales Agency in similar operation of other plants and shall be paid to the Local on all prunes, apricots and other dried fruits shipped by it as soon as possible after the proceeds for said prunes, apricots and other dried fruits have been received by the Central Sales Agency.

4. The Central Sales Agency agrees to resell such prunes, apricots and other dried fruits, together with prunes, apricots and other dried fruits of like quality, grade, and classification delivered by other Locals under similar contracts at such prices and at such time as in its judgment and discretion it deems best for the interest of all Locals and to pay over the net amounts received therefrom as payment in full to the Locals according to the value of the prunes, apricots and other dried fruits delivered by each of them after deducting therefrom, within the discretion of the Central Sales Agency, the cost of receiving, processing, manufacturing, handling, storing, transportation, advertising and all other expenses of marketing and also such other deductions for reserves or revolving capital funds as may be created, which said deductions for capital purposes shall not exceed 5% of the gross sale proceeds, all of such deductions to be determined from time to time in the discretion of the Board of Directors of the Central Sales Agency.

5. The Central Sales Agency is authorized by the Local to resell said prunes, apricots and other dried fruits either through agents or brokers to or through such channels of distribution as in its judgment it shall deem advisable. The Central Sales Agency is hereby authorized to and shall pool or mingle said prunes, apricots and other dried fruits with the prunes, apricots and other dried fruits delivered by other Locals under agreements generally similar to this. The Central Sales Agency is hereby given full power and authority at its option and from time to time in its discretion to amend, change or modify classifications or pools and or to establish additional pools or to abolish or change rules or time limits of said pools or any of them.

To enable the Central Sales Agency to better and more economically market the prunes, apricots and other dried fruits delivered to it by the respective Locals and to eliminate the possibility of favoritism in marketing and to insure to each Local a fair and equitable distribution of the proceeds received upon sales made, all of the prunes, apricots and other dried fruits to be marketed through the Central Sales Agency shall be pooled whenever possible under such uniform rules and regulations and standards as may be adopted by the Board of Directors of the Central Sales Agency, and all proceeds from the sale of the respective pools so established shall be distributed to each Local proportionate to its interest therein.

The Central Sales Agency is hereby given full power and authority to determine to which pool as herein mentioned any prunes, apricots or other dried fruits of Locals shall belong and for that purpose shall have power from time to time to inspect, and authority is hereby given to it by Locals to inspect, all prunes, apricots and other dried fruits on the delivery thereof and to inspect all operations in the preparation of such prunes, apricots or other dried fruits for market; such prunes, apricots and other dried fruits to be inspected by inspectors designated by the Central Sales Agency.

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In the event of any disagreement between the Central Sales Agency and the Local as to which of the pools herein mentioned said prunes, apricots or other dried fruits belong or should be assigned, the decision of the Board of Directors of the Central Sales Agency thereon shall be final and conclusive.

Prunes, apricots and other dried fruits of special grade or quality not conforming to any of the standard classifications as established by the Central Sales Agency may be sold for the account of the individual Local furnishing the same as determined in the discretion of the Board of Directors of the Central Sales Agency.

The Central Sales Agency is hereby authorized to establish brands or trademarks and to market said prunes, apricots or other dried fruits under said brands or trademarks and Locals shall not have the right to place upon containers any marks or brands except as is permitted by the Central Sales Agency. Any and all trademarks or trade names used or employed by the Central Sales Agency are and shall be its sole and separate property and no Local shall have, nor shall any member or stockholder of any Local have, any right or interest or claim thereof, and the time, place and manner of use and supply of said trademarks and trade names shall be solely as prescribed from time to time by the Central Sales Agency.

6. Proceeds of resales of prunes, apricots and other dried fruits shall be distributed to Locals from time to time as received by the Central Sales Agency and as rapidly as the Central Sales Agency in its judgment believes that marketing and financial conditions justify.

In making distributions, the Central Sales Agency shall consider and establish differentials between such pools and from time to time shall change or modify such differentials as the Directors of the Central Sales Agency shall determine reasonable in view of market conditions.

All assessments or expenses of the Central Sales Agency against Locals shall be made in such manner as the Directors of the Central Sales Agency shall deem just and proper and justified as to all pools, and shall be assessed against each of the Locals under like uniform rules and regulations depending primarily upon the actual cost of the service rendered and the value or volume of the business transacted.

The parties hereto agree and it will be conclusively held that the title to said prunes, apricots and other dried fruits passes absolutely and unreservedly to the Central Sales Agency upon delivery by members of the Local of said prunes, apricots and other dried fruits to a packing house or receiving plant of said Local or Central Sales Agency or a grading point designated by the Local or Central Sales Agency. Each Local expressly agrees that the Central Sales Agency shall have the power and it is hereby given the power to borrow money and to incur obligations in its name and on its own account for any purpose on the prunes, apricots or other dried fruits delivered to it, upon their drafts, acceptances, notes or otherwise, or on any warehouse receipt or bills of lading or upon any accounts for the sale of said prunes, apricots or other dried fruits or any commercial paper delivered therefor, and to exercise all rights of ownership over the same without limitation and to pledge in its own name and for its own account such prunes, apricots and other dried fruits, drafts, bills of lading, warehouse receipts, notes, acceptances, orders or other commercial paper as collateral.

Out of the funds so received, the Central Sales Agency shall advance to the respective Locals after making necessary deductions for its estimated expenses such proportion thereof as the value of the products to be marketed by each bears to the total value of all products so to be marketed; such advance to be made as soon as practicable after delivery.

No person lending money on security of said prunes, apricots and other dried fruits or dealing with the Central Sales Agency pursuant to authority conferred upon it by this agreement shall be under any duty to see to the application of the proceeds of said loan.

7. Losses.

In the event that any loss occurs by reason of the failure or inability of the purchaser of prunes, apricots or other dried fruits to pay therefor, or in the handling or shipping of the prunes, apricots and other dried fruits after the same have been shipped at the instruction of the Central Sales Agency, such loss shall be borne by and charged against and be an expense upon all of the pools of prunes, apricots or other dried fruits of that crop and shall be met in the same manner and according to the same basis of proportion as other items of expense of the Central Sales Agency.

Where a Local has packing facilities, any loss in prunes, apricots or other dried fruits arising out of the failure of the Local to properly handle or care for such products shall be charged to the Local causing the same.

All books, records, accounts, and other documents affecting the business to be carried on by the Central Sales Agency shall at all times during business hours be open to the inspection of the Locals or any person designated by them who may present proper evidence of authority to make such examination. The books, records, accounts, transactions, and agreements of the Locals concerning such matters shall be similarly open to the Central Sales Agency. The Central Sales Agency shall perform such accounting for the Locals as it may be required to do by them, and shall receive therefore the actual costs of such accounting.

8. REMEDIES.

(a) Inasmuch as the remedy at law is and would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine or fix the actual damage resulting to the Central Sales Agency if the Local fails to sell and deliver to the Central Sales Agency all of said prunes, apricots and other dried fruits and apricot pits as herein provided, each Local agrees to pay to the Central Sales Agency as liquidated damages for the breach of this contract, in that regard twenty per cent (20%) of the total market value of the prunes, apricots or other dried fruits or apricot pits withheld, delivered, sold, consigned or marketed by or for it other than in accordance with the terms of this agreement; said market value to be determined as of the time that demand for delivery of said prunes, apricots or other dried fruits is made by the Central Sales Agency, or if said prunes, apricots and other dried fruits have been sold by the Local, then the price for which said prunes, apricots or other dried fruits shall have been sold shall be taken as the market value thereof.

(b) All of the parties hereto agree that by reason of the nature of this agreement, the Central Sales Agency is entitled to the remedies of specific performance and injunction as provided by the laws of the State of California for co-operative marketing associations to prevent a breach or further breach of this agreement.

(c) If the Central Sales Agency brings any action against any Local to enforce any provision of this agreement or to secure specific performance hereof, or to collect damages of any kind for any breach hereof, the Local agrees to pay to the Central Sales Agency all costs of court, costs for bonds and otherwise, expenses of traveling and all expenses arising out of or caused by the litigation, including a reasonable attorney's fee expended or incurred by the Central Sales Agency in any such proceeding and all costs and expenses shall be included in the judgment obtained in said action.

(d) The Local agrees that any right or remedy which it has or may have against a grower-member which right or remedy Local fails to enforce against said grower-member with in ten (10) days after request so to do made by Central Sales Agency may be exercised and enforced by the Central Sales Agency either in the name of the Central Sales Agency or in the name of the Local or both as Central Sales Agency deems advisable and any recovery made by the Central Sales Agency in the enforcement of remedy or right shall be and become the property of the Central Sales Agency.

9. It is expressly agreed that this instrument is one of a series substantially identical in terms. All of such instruments shall be deemed one contract for the purpose of binding the signers, to the same extent as if all of the subscribers had signed only one such contract.

10. The parties agree that there are no oral or other conditions, promises, covenants, representations, or inducements in addition to or at variance with any of the terms hereof, and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

Signed at _____, California, this _____ day of _____, 19__ Local

by _____

Accepted at San Jose, California (SEAL)

this _____ day of _____, 19__

CALIFORNIA PRUNE AND APRICOT GROWERS ASSOCIATION,

by _____

Secretary.

(SEAL)

[Endorsed]: No. 12496. United States Court of Appeals for the Ninth Circuit. Oscar R. Ewing, Federal Security Administrator, Appellant, vs. Mary R. Baiocchi, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 10, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12496

OSCAR R. EWING, Federal Security Administrator,

Appellant,

vs.

MARY R. BAIOCCHI,

Appellee.

APPELLANT'S STATEMENT OF THE POINTS ON WHICH HE INTENDS TO RELY UPON APPEAL, AND DESIGNATION OF THE RECORD ON APPEAL.

Comes now the appellant in the above matter and presents his statement of the points on which he intends to rely on appeal, as follows:

1. Appellant adopts as his statement of the points on which he intends to rely the "Statement of Points to be Relied on by Defendant on Appeal," filed in the District Court in the above action and included in the transcript of record filed in this Court.

Appellant designates the entire Clerk's transcript of the record, which includes the transcript of the proceedings before the Referee of the Federal Security Agency, together with the following exhibits —C, E, F, K, and L, to be printed.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant United States Attorney, Attorneys for Appellant.

[Endorsed]: Filed March 22, 1950.